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THE PENAL LAW OF ISLAM

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By

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(7 : 3)

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PREFACE

It is a curious fact that not even a single book on the Criminal Law of Islam is available in the English language. The reason for lack of such a book is not known, but, at any rate, it absolves me from offering an apology for venturing to treat of so vast a subject. This work, the first of its kind, is an attempt to appraise and elucidate the Penal Law of Islam.

This book is the result of a deep study of the works of the authorities on Islamic Law. I have referred to these authorities in the Bibliography instead of encumbering the reader with lengthy footnotes citing the original sources. I owe an enormous debt of obligation to all the eminent Scholars, particularly Maulānā Syed Abū Ā'ālā Maudūdī, Syed Muhammad Qutb, 'Abdul Qādir 'Uda Shahid, Justice S. A. Raḥmān, Justice Muhammad Sharif, Justice B. Z. Kaikāūs, Maulānā Amin Ahsan Iṣlāhi, Prof. 'Abdul Ḥameed Siddiqi, Maulānā Khalil Hāmidi and Malik Ghulam 'Ali, from whose works I have drawn liberally while writing this book.

I am conscious of my shortcomings and imperfections, and leave it to those more competent than

I to give the subject a comprehensive treatment by their scholarship.

I hope this book will be of some practical use equally to the Legislators, Judges, Lawyers, Social Reformers, Students of Law and all others who are interested in an all-round and accurate information on the Penal Law and Criminal Procedure of Islam.

In the end, my special thanks are due to my younger brother, Prof. Muḥammad Ikrām Ṣiddīqī, for bringing out the book in a beautiful form.

LAHORE

MUHAMMAD IQBĀL ṢIDDIQI

24th November, 1979

CHAPTER 1

ISLAMIC CONCEPT OF CRIME

Before deciding whether or not a criminal should be punished, we must determine the extent of his responsibility for the offence he committed. It is to be noted that Islam takes this into account when it considers the question of crime and punishment.

Islam holds the balance of justice in the right manner and insists on examining all conditions and circumstances connected with the offence. On studying a crime Islam takes into consideration at the same time the viewpoint of the criminal and that of the community against which aggression took place. In the light of such considerations Islam prescribes the fair punishment which is in accordance with the dictates of sound logic and wise reasoning.

A person commits crime because he knows that he can escape the grip of law for lack of evidence ; he may succeed in getting acquittal through the influence of persons or wealth. Last of all, if he is punished, the punishment will be much less than the magnitude of injury he has done, or the wrongful gain he has made. But the one who believes in the

existence of Allāh, and the life Hereafter may even in the thick layers of darkness, desist from committing crime because of the fear that permanent witnesses appointed on his shoulders by the Sovereign are present and cannot be avoided in any way. He will not be able to abscond and escape punishment. However secretly a man may plot, everything is known to Allāh. His recording Angels are, by at all times and in all places, to prepare a record of his deeds for his own conviction when the time comes for final judgment. The Holy *Qur'ān* says :

أَمْ يَحْسُبُونَ أَنَّا لَا نَسْمَعُ سِرَّهُمْ وَنَجْوَاهُمْ ۖ بَلَىٰ وَرُسُلُنَا لَدَيْهِمْ يَكْتُبُونَ ۝

“Or deem they that We cannot hear their secret thoughts and private confidences? Nay, but Our envoys, present with them, do record.”

(43 : 80)

Not only Allāh is having track and full record of everything going on in this universe but also according to Islam, this record of events is being preserved and will be presented on the Last Day. Each and every individual is answerable to Allāh on that Day and everybody will be either rewarded or punished according to his deeds performed during his or her life tenure in this universe. He may escape punishment of any crime committed by producing false evidence in this world, but in the next world he or she is bound to face the consequences. The Holy

Qur'ān says :

وَكُلُّ إِنْسَانٍ لِّزَمْنِهِ لَدَيْهِ عُنُقٌ ۖ وَتُخْرِجُ لَهُ يَوْمَ الْقِيَمَةِ
كِتَابًا يَلْقَاهُ مِنْشُورًا ۖ أَقْرَأْ كِتَابَكَ ۖ كَفَىٰ بِتَفْسِكَ الْيَوْمَ عَلَيْكَ
حَسِيبًا ۝

“And every man’s augury have We fastened to his own neck. On the Day of Judgment We shall bring out for him a scroll, which he will see spread open. (It will be said to him :) “Read thine (own) record : Sufficient is thy soul this Day to make out an account against thee.”

(17 : 13, 14)

Again the Holy *Qur'ān* says :

وَتَرَىٰ كُلَّ أُمَّةٍ جَائِيَةً ۖ كُلُّ أُمَّةٍ تُدْعَىٰ إِلَىٰ كِتَابِهَا ۖ الْيَوْمَ تُجْزَوْنَ
مَا كُنتُمْ تَعْمَلُونَ ۝ هَذَا كِتَابُنَا يَنْطِقُ عَلَيْكُمْ بِالْحَقِّ ۖ إِنَّا كُنَّا
نَسْتَنْسِخُ مَا كُنتُمْ تَعْمَلُونَ ۝

“And thou will see every sect bowing the knee ; Every sect will be called to its record. This Day shall ye be recompensed for all that ye did. This Our Record speaks about you with truth, for We were wont to put on record all that ye did.”

(45 : 28, 29)

Now this comprehensive system of belief in the Unseen (One Allāh), accountability on the Day of Resurrection and Allāh’s Own Guidance about right

and wrong makes the behaviour and living of a man quite distinct from the one having any other conception about man's status in this universe.

Human behaviour over thousands of years endorses this fact that the people who do not consider themselves as answerable and responsible to Allāh, who act on this presumption that life is but of this world only, who measure one's success or failure according to the attainments achieved in this world in respect of wealth, power and popularity, who depending upon their materialistic views reject Allāh's Guidance, do become a symbol of wickedness. They live like animals paying least regard to any moral values. Actually their moral values follow the footsteps of their desires and selfish ends. To achieve these ends, they commit every sort of cruelty and injustice. Their misdeeds convert the whole universe into a hell for others. All the mischief was introduced by Evil. The Holy *Qur'ān* says :

طَهَرَ الْفَسَادُ فِي الْبَرِّ وَالْبَحْرِ بِمَا كَسَبَتْ أَيْدِي النَّاسِ

“Mischief has appeared on land and sea because of (the meed) that the hands of ^{people} ~~men~~ have earned.” (30 : 41)

Actually a man devoid of Allāh's Guidance and the conception of accountability in the life Hereafter may be a great man otherwise, but is bound to behave like a beast. He runs after the benefits, lusts and comforts of the world and succumbs to temptations. He is so overpowered by avarice of these

low desires that he discards all the moral values. He transgresses all the limits that he ought to have observed. Such human beings are no doubt like animals. The Holy *Qur'ān* says :

وَلَقَدْ ذَرَأْنَا لِجَهَنَّمَ كَثِيرًا مِّنَ الْجِنِّ وَالْإِنسِ لَهُمْ قُلُوبٌ

لَّا يَفْقَهُونَ بِهَا وَلَهُمْ أَعْيُنٌ لَّا يُبْصِرُونَ بِهَا وَلَهُمْ أَذَانٌ

لَّا يَسْمَعُونَ بِهَا أُولَٰئِكَ كَآلَٰ نَعَامٍ بَلْ هُمْ أَضَلُّ أُولَٰئِكَ

هُمُ الْغَافِلُونَ ۝

“Many are the Jinns and human beings We have made for Hell. They have hearts wherewith they understand not, eyes wherewith they see not, and ears wherewith they hear not. They are like animals—nay, even worse, for they are heedless (of warning).” (7 : 179)

It is but natural that man not believing in the Unseen, Day of Resurrection and Likes and Dislikes of Allāh should behave like an animal. After all, if a human being does not possess the conception of accountability on some day and thinks that he is not going to be rewarded for his good deeds and punished for his bad actions, why should he act rightly, why should he make sacrifice for others and why should he undergo any sort of moral restraints ? It is the fear of Allāh, surrender before His Almighty Power and fear of the Day of Judgment that makes man to save himself from all sorts of crimes.

CAUSES OF CRIME

(a) Inner Urge

Islam works for removal of sins and thereby removes the chances of brewing crime. Every crime is sin but every sin is not a crime. If the sin is removed the brewing of crime will be minimised, but if the sin remains unattended and the society is not secured from the sinners who have indulged into the sin due to the inner urge, crime will be rampant, and no punishment will be useful in curing the criminals. Therefore, the basic question is to reform the society from the sinful life.

Secondly, Islam strives by various means to preclude circumstances that may lead to crime. There are sins which emerge out of the inner urge and environments create cause for it : such as false suspicion, envy, malice, sneaking whisper and the desire of godhood. It is the lust for power and desire for exploitation that prompts him to project himself on other people as god and extract their obedience, force them to bow down before him in reverential awe and make instrument of self aggrandisement. Although no one can be punished for any of these sins by any human society for the reason that none of these can be brought in a judicial court and none can be proved by documentary or circumstantial evidence, yet a person who is under influence of such sins may commit crime by causing injury to the society or to the individuals in one way or the other.

Therefore, Islam takes notice of these sins and tries to remove them from the society.

(b) Environmental Influence and Incentive of Crime

Man as a species of the living creature is in need of food, clothing, shelter, comfort and other things connected with the security of life and security of his race. He labours and exerts for getting his needs. If he can get his needs without any hinderance, discrimination or preference for any person or a group then there will be no inducement for a man to act unlawfully. Islam takes full responsibility to see that the basic needs of life are provided, and takes care of the needs of the destitute. It manages to provide equal privileges and opportunities for every citizen to enable him to seek economic livelihood. Then social atmosphere is created in which none is compelled by force of circumstances to steal. To remove adultery and suppress the desire of sexual intercourse, marriage has been made easy. Mixed gathering of men and women and public appearance of painted and pampered women are completely prohibited. In the society so organised, having love for virtues and hate for evils and sins, it will not be tolerated by the society that any person may be sinful or may disturb the economic system, or cause difficulties for the citizens to earn their livelihood through honest and legal means. In such a society if any one would insist to carry on the evil designs, try to encroach upon the right of others, pollute the social atmosphere and commit crime when there

was no incentive for doing so, it becomes absolutely essential to isolate, eliminate, exterminate and annihilate such elements for security of the social set up. It is for such elements that punishment is to be inflicted and law should operate.

ISLAMIC CONCEPT OF PUNISHMENT

The punishment prescribed by the law cannot be reduced or increased even under sentiments of mercy. The Holy *Qur'ān* says :

وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ
وَالْيَوْمِ الْآخِرِ

“And let not pity for the twain withhold you from obedience to Allāh, if you believe in Allāh and the Last Day. (24 : 2)

From the above verse of the Holy *Qur'ān*, the following conclusions may be drawn :

1. If the guilt is proved, the culprit must be punished at all costs.
2. There should be no mercy in inflicting the punishment.
3. The prescribed punishment cannot be replaced : (a) if the change is due to the sense of mercy, it is disobedience, (b) if it is due to the sense of cruelty, it is denial and defiance and only a hypocrite can imagine or say so.

The Holy Prophet (peace and blessings of Allāh be upon him) is reported to have said :

An officer will be produced on the Day of Judgment who reduced a stripe from the punishment. He will be questioned for the reduction. "On the ground of mercy for Thy slave", will be his reply. "Were you more merciful than Myself", Allāh will say unto him, thus he will be ushered to be taken to the Hell.

Another officer will be produced who enhanced the punishment by one stripe. He will be questioned for his doing so. "To stop them from disobedience", will be his reply. Allāh will say unto him, "Do you stand wiser than Me" ? and he will be ordered to be taken to Hell.

The above was the decision of the case when punishment was changed either way, but if reduction or the enhancement is in view of the status of the man it will become worst.

‘Ā’isha (Allāh be pleased with her) reported Allāh’s Messenger (peace and blessings of Allāh be upon him) as saying : "O people, the nations have gone, who were destroyed for the reason that one of status if he committed theft was overlooked and when a poor powerless committed theft he was punished."

Object of Punishment

Humiliation for the convict and the lesson for the public is the purpose of punishment. Thus the

object of punishment is :

1. To award punishment to the culprit equal to the magnitude of his guilt.
2. To prevent him for repeating the crime.
3. To serve as a lesson for others so that inclinations of crime be removed through this operation and none may dare commit crime.
4. Punishment be given publicly so that the officer may not favour any one while inflicting punishment. This public display will have deterrent effect, and all those in the public who had inclination of committing crime will know that they will have to endure such punishment if they commit a crime.
5. Protection of honour and chastity : In the modern system very little value is attached to the honour of man and chastity of woman. We find that fornication is no crime under the modern systems. Adultery is a crime to the extent that the adulterer has infringed the right of the husband.

Islam assigns priority to the value attached to the chastity of women and to the respect and honour of men. Therefore, it takes strong measures to preserve this value. Thus we see that the severest punishment is prescribed for persons who molest a woman, or dishonour a man. Therefore, punishment is prescribed in this respect by

Allāh and it has not been left to man to impose punishment for such crimes at his own discretion. Islam differentiates between fornication and adultery. For the former hundred stripes, and stoning to death for the latter, are prescribed. For false accusation, the punishment of eighty stripes is also prescribed, and the criminal cannot escape punishment unless he produces four witnesses to prove accusation.

6. Preservation of Life : In the modern system apparently importance is attached to the life of a man but the State has become a party in all such cases instead of satisfying the aggrieved. Therefore, the State punishes a criminal unmindful of the fact that the revenge exists or is washed out of the mind of the aggrieved. Under this legal system neither revenge is removed nor the recurrence of crime is checked with the result that a long chain of murders and crimes continues between the parties.

Under the Islamic Legal System, an equal right of revenge is permitted. Eye for eye, ear for ear, limb for limb and life for life is the law. But this is the right of a person who received injury or of his heir and not the State as is seen in the other legal systems. Therefore, the aggrieved can forgive the accused or demand compensation instead of revenge. Islamic Law is so

clear and natural that if this law is enforced the chain of crime which continues between the parties involved for generation by generation will be finished. The basic object of Penal Law of Islam is eradication of grievance from the heart and mind of the aggrieved party.

7. **Preservation of Property :** In the un-Islamic system highest value is attached to the property and there is distinction between a man of the upper class and a common man. In order to protect machines and palaces, sometimes hundreds of persons are shot dead ; and there is nothing in the so-called modern legal system to redress the aggrieved. No such class distinction exists in Islam.

Islam distinguishes between theft and dacoity, embezzlement, bribery, dishonesty and criminal breach of trust in prescribing punishments. Punishment for theft and dacoity are prescribed by Allāh and no one can make any change in it. As regards punishments for embezzlement, it is left to the discretion of the Qāḍī. There is also distinction in the crime of theft of eatables, i.e., fruits, vegetables etc., in regard to inflicting prescribed punishment. A person who steals to appease his hunger cannot be punished if he steals an eatable to keep his soul and body together.

MAIN CHARACTERISTICS OF PUNISHMENTS PRESCRIBED BY ISLAM

Punishments prescribed by Islam have been severely objected to by the opponents of Islam. Punishments in Islam include amputation of hand, flogging and stoning to death and are thus considered very severe. But apart from being severe these punishments have some prominent characteristics which are not usually taken into account while making this objection. Some of the chief characteristics are :

1. These punishments are inflicted as a last resort.
2. These punishments are inflicted to serve as an example to others.
3. These punishments are reformative.
4. These punishments are retributive, and redressive.

1. Punishment is inflicted as a last resort

Islam does not remain in search of any victim committing offence and as soon as it comes across one it inflicts the punishments immediately. Actually Islam leaves no stone unturned to block all the channels leading to a sin and it is in very rare cases that one commits sin and is thus exposed to punishment. For example we take adultery or fornication and see how Islam imposes checks to wipe out their very possibility.

- (a) *Internal Checks* : Belief in the Hereafter is the backbone of these checks. Islam ex-

plains that every action major or minor of every human being is recorded very accurately and this record will be placed before each and every individual on the Day of Resurrection, thus rewarding or disrewarding him depends upon the nature of actions. An act done in the thick layers of darkness may remain a secret in this world but cannot go unresponded in the life Hereafter. Even the feelings and passions taking turn in the very corner of any heart, is known to Allāh and cannot go unnoticed. In this way apart from external checks Islam establishes a permanent sort of internal checks in the very heart of each of its followers. This is the greatest check in the way of incentives leading to sins.

- (b) *External Checks* : Then Islam imposes external checks, which are again of two types:

INSTITUTION OF MARRIAGE

1. In the first instance it induces the individual to marry and makes the institution of marriage as easy as possible. Celibacy has been condemned and it has been ordained that unmarried people must be brought into the bondage of marriage. Bachelors if nothing else do, generally start taking interest in spreading foul news. Thus in the Holy *Qur'ān* it is said :

وَأَنْكِحُوا الْأَيَامَىٰ مِنْكُمْ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِسَائِكُمْ ۚ
 إِنْ يَكُونُوا فُقَرَاءَ يُغْنِيهِمُ اللَّهُ مِنْ فَضْلِهِ ۚ وَاللَّهُ وَاسِعٌ عَلِيمٌ ۝
 وَلَيْسَتَعْنِفِ الَّذِينَ لَا يَجِدُونَ نِكَاحًا حَتَّىٰ يُغْنِيَهُمُ اللَّهُ مِنْ فَضْلِهِ ۚ

“And marry those among you who are single, and those who are pious among your male slaves and your female slaves ; if they are needy, Allāh will make them free from want out of His Grace ; and Allāh is Ample-Giving, Knowing. And let those who cannot find a match keep chaste until Allāh makes them free from want out of His Grace.” (24 : 32, 33)

Hadīth also lays great stress upon living in a married state. The Holy Prophet (peace and blessings of Allāh be upon him) is reported to have said, “O assembly of young people ! Whoever of you has the means to support a wife, he should get married, for this is the best means of keeping the looks cast down and guarding chastity, and he who has not enough means, let him keep fast, for this will act as castration.” (Bukhārī)

According to another *Hadīth* the Holy Prophet (peace and blessings of Allāh be upon him) said : When a servant (of Allāh) marries, he perfects half (his) religion ; and let him fear Allāh in regard to the remaining half. (Mishkāl)

2. Monasticism as well as celibacy is disallowed.

3. If a man is not satisfied with one wife, he is allowed to marry upto four ladies.
4. A widow is allowed to remarry as and when she deems fit (except for a short period after the death of her husband).
5. If a couple gets fed up of each other the provision of divorce has been made, which can be exercised by either of them.
6. After separation there is no restriction if any one of them wants to remarry (except for a woman who is required to wait for a few months or till the end of pregnancy).
7. Early marriage has been encouraged. Reward in the Hereafter has been announced for those fathers who marry their daughters as soon as signs of puberty appear.
8. Whereas the illegal sexual act (fornication) between man and woman is said to be severely punishable, the legal sexual act (through marriage) is reported to be a part of devotion.

RESTRICTIONS ON FREE MIXING OF MEN AND WOMEN

Secondly, Islam puts restrictions on the general mixing of men and women :

1. Women's activities have been restricted within the walls of the house. Even when

coming out of their houses for certain necessities of life women are forbidden to display their beauty and make up and to wear ringing and attracting ornaments. The Holy *Qur'ān* says :

وَقَرْنَ فِي بُيُوتِكُنَّ وَلَا تَبَرَّجْنَ تَبَرُّجَ الْجَاهِلِيَّةِ الْأُولَى ۝

“And stay in your houses and display not your finery like that of the Times of Ignorance.”

(33 : 33)

2. The institution of ‘veil’ is the corner-stone to guard the chastity of the women. The Holy *Qur'ān* says :

يَا أَيُّهَا النَّبِيُّ قُلْ لِّأَزْوَاجِكَ وَبَنَاتِكَ وَنِسَاءِ الْمُؤْمِنِينَ يُدْنِينَ

عَلَيْهِنَّ مِنْ جَلَابِيبِهِنَّ ۖ ذَٰلِكَ أَدْنَىٰ أَنْ يُعْرَفْنَ فَلَا يُؤْذَيْنَ ۖ

“O Prophet ! say to thy wives and thy daughters and the women of the believers that they should cast their outer garments over their persons ; this will be more proper, that they may be known (ladies of reputation) ; and thus they will not be given trouble.”

(33 : 59)

3. Even when coming across, men and women are not allowed to gaze at each other lustily : The Holy *Qur'ān* says :

قُلْ لِّلْمُؤْمِنِينَ يَغْضُوا مِنْ أَبْصَارِهِمْ وَيَحْفَظُوا فُرُوجَهُمْ ۖ ذَٰلِكَ

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(33 : 33)

2. The institution of ‘veil’ is the corner-stone to guard the chastity of the women. The Holy *Qur'ān* says :

يَا أَيُّهَا النَّبِيُّ قُلْ لِّأَزْوَاجِكَ وَبَنَاتِكَ وَنِسَاءِ الْمُؤْمِنِينَ يُدْنِينَ

عَلَيْهِنَّ مِنْ جَلَا يُبَيِّنُ ۖ ذَٰلِكَ آدُنِي ۖ أَنْ يُعْرِفْنَ فَلَا يُؤْذِينَ ۖ

“O Prophet ! say to thy wives and thy daughters and the women of the believers that they should cast their outer garments over their persons ; this will be more proper, that they may be known (ladies of reputation) ; and thus they will not be given trouble.”

(33 : 59)

3. Even when coming across, men and women are not allowed to gaze at each other lustily : The Holy *Qur'ān* says :

قُلْ لِّلْمُؤْمِنِينَ يَغْضُوا مِنْ أَبْصَارِهِمْ وَيَحْفَظُوا فُرُوجَهُمْ ۖ ذَٰلِكَ

أَزْكَىٰ لَهُمْ ۚ إِنَّ اللَّهَ خَبِيرٌ بِمَا يَصْنَعُونَ ۝ وَقُلْ لِلْمُؤْمِنَاتِ يَغْضُضْنَ
 مِنْ أَبْصَارِهِنَّ وَيَحْفَظْنَ فُرُوجَهُنَّ وَلَا يُبْدِينَ زِينَتَهُنَّ إِلَّا مَا ظَهَرَ
 مِنْهَا وَلْيَضْرِبْنَ

“Say to the believing men that they should lower their gaze and restrain their sexual passions. That is purer for them. Lo ! Allāh is aware of what they do. And say to the believing women that they should lower their gaze and restrain their sexual passions and should not display their ornaments except what appear thereof.”

(24 : 30, 31).

Islam does not allow that a man should cast eyes upon women except his own wife or *Mahrams* (the women of the prohibited degrees, closely related to a man like mother, sister, daughter, etc.) in full gaze. The first surprise look is naturally unavoidable, but the second sight upon ladies except those mentioned above is not allowed. Such a sort of looking at is tantamount to fornication according to a saying of the Holy Prophet (peace and blessings of Allāh be upon him) who said that a man can commit fornication through all his senses. Staring is a fornication of the eyes ; passion-arousing and artificial type of talk is a fornication of the tongue ; to enjoy the voice is a fornication of the ear, and to touch and walk for an illicit act is the fornication of the hands and feet.

4. Islam lays great stress upon the privacy of home-life. In the first place entering other's house without permission is forbidden. The Holy *Qur'ān* says :

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَدْخُلُوا بُيُوتًا غَيْرَ بُيُوتِكُمْ حَتَّى تَسْتَأْذِنُوا
وَتَسَلِّمُوا عَلَى أَهْلِهَا ط

"O you who believe ! Do not enter houses other than your own houses until you have asked permission and saluted their inmates." (24 : 27)

Another verse of the Holy *Qur'ān* runs thus :

يَا أَيُّهَا الَّذِينَ آمَنُوا لِيَسْتَأْذِنَ الَّذِينَ مَلَكَتْ أَيْمَانُكُمْ وَالَّذِينَ
لَمْ يَبْلُغُوا الْحُلُمَ مِنْكُمْ ثَلَاثَ مَرَّاتٍ ط مِنْ قَبْلِ صَلَاةِ الْفَجْرِ وَحِينَ
تَضَعُونَ ثِيَابَكُمْ مِنَ الظَّهِيرَةِ وَمِنْ بَعْدِ صَلَاةِ الْعِشَاءِ ثَلَاثُ
عَوْرَاتٍ لَكُمْ ط

"O you who believe ! Let those whom your right hands possess, and those of you who have not attained puberty ask permission of you three times : before morning prayer, and when you put off your clothes at midday in summer and after the prayer of night. There are three times of privacy for you." (24 : 58)

Privacy of home-life is not limited to the entering other houses only. But there are clear *Ahādīth*

of the Holy Prophet (peace and blessings of Allāh be upon him) which forbid to peep into the houses of others and to stay in front of the doors of other's houses while calling them out. As a corollary, reading the letters of others without their permission is a sin. Further the instructions not to enter into houses without the permission of their inmates are not limited to the other's houses only, but even entering into the house of the mother or sister without seeking her permission is not allowed. Once a man asked the Holy Prophet (peace and blessings of Allāh be upon him) : I am required to go to my mother frequently as there is none else to look after her except myself, so should I seek her permission each time I have to go to her ? The Holy Prophet (peace and blessings of Allāh be upon him) said, "Do you like to see your mother naked otherwise" ?

5. Islam does not allow talking of men and women face to face (with the exception of *Mahrams*). The Holy *Qur'ān* says :

وَاللَّهُ لَا يَسْتَحْيِي مِنَ الْحَقِّ وَإِذَا سَأَلْتُمُوهُنَّ مَتَاعًا فَسَأَلُوهُنَّ

مِنْ وَرَاءِ حِجَابٍ ذَلِكُمْ أَطْهَرُ لِقُلُوبِكُمْ وَقُلُوبِهِنَّ

"And when you ask them (the wives of the Holy Prophet) for anything you want, ask them from behind a curtain, that makes for greater purity for your hearts and for theirs." (33 : 53)

It is thus clear from the above verse of the Holy *Qur'ān* that when men and women are forbidden

face to face talk, the question of mixed gatherings, co-education, and their working together in offices and factories does not arise. Even when talking from behind a curtain the women should speak firmly, so that someone having bad intentions may not feel inclination in the talk.

6. Last but not the least is the overall system ordained by Islam to keep the general atmosphere of the Muslim Society pure of false rumours and lustful talks. Islam does not allow that its followers should propagate sexual news and enjoy by playing with the character of others. A false accusation of adultery (*qadhf*) is punished almost as severely as adultery itself. The Holy *Qur'ān* says :

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَا يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ

تَعْنِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ ۝

إِلَّا الَّذِينَ تَابُوا مِن بَعْدِ ذَلِكَ وَأَصْلَحُوا ۚ فَإِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ ۝

“And those who accuse free women of fornication, then do not bring four witnesses, scourge them with eighty stripes, and never admit evidence from them ; for such men are indeed transgressors. Except those who repent after this and act aright, for Allāh is Forgiving, Merciful. (24 : 4, 5)

It may be seen here that while in ordinary matters two witnesses are required, in case of an accusation of adultery four witnesses must be produced. Thus a case of adultery can be established on the strongest possible evidence.

In view of this comprehensive system of internal and external checks, one can easily visualize the general environment in which committing of an offence itself becomes almost impossible. The last nail in this system, however, is thrust by the fear of a severe punishment.

Thus the Penal Law of Islam curbs fornication and adultery by force as a last resort. Whereas the moral teachings of Islam cleanse man within so that he does not feel inclined towards sinning; its penal law regulates his external behaviour so that in case the moral teachings remain ineffective, his evil inclinations taking practical shape may be suppressed by force.

The Holy Prophet (peace and blessings of Allāh be upon him) said: Protect the Muslims as far as possible against the application of the Law. Let the culprit off if he can possibly be let off. For the Imām making a mistake in forgiving is better than his making a mistake in applying the Law. (*Tirmidhī*)

2. Punishments are Exemplary

Now one can easily think of the social set-up in which such a comprehensive plan of checks is exercised. But in spite of all these internal and external checks if one still commits a crime, severe

punishment should be inflicted on the convict because he has no excuse or justification. Even while inflicting punishment, Islam still plans to make use of it in one way or the other. By inflicting exemplary punishment to a stubborn wrong-doer Islam carries out psychological operation of all those in the society having criminal intentions and trends. This is the object of gathering the masses on the occasion of punishing the adulterers. This is why hands or feet are cut off and this is why a punishment like stoning to death is carried out in open day light. Hanging somebody in the late hours of night as is prevalent in many present days' so-called civilized countries is not allowed by Islam, because it does not serve as an example to others.

3. Punishments are Reformative

It may be noted that whenever in the Holy *Qur'ān* the punishment has been prescribed for an offence, it has been concluded either by advice or by a threat of punishment in the life Hereafter mentioning Great Attributes of Allāh Almighty. For example, in cases of murder, the Holy *Qur'ān* says:

وَمَنْ يَفْعَلْ ذَلِكَ يَلْقَ أَثَامًا ۖ لَا يُضْعَفُ لَهُ الْعَذَابُ يَوْمَ الْقِيَمَةِ
وَيَخْلُدُ فِيهِ مُهَانًا ۝

"And he who does this shall (not only) receive the punishment (but) the chastisement shall be doubled to him on the Day of Resurrection, and

he shall abide therein in abasement."

(25 : 68, 69)

Further, the Holy *Qur'ān* says :

وَلَكُمْ فِي الْقِصَاصِ حَيَوةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ ۝

"And there is life for you in the law of retaliation, O men of understanding, that you may guard yourself." (2 : 179)

In case of theft, the Holy *Qur'ān* says :

مَنْ تَابَ مِنْ بَعْدِ ظُلْمِهِ وَأَصْلَحَ فَإِنَّ اللَّهَ يَتُوبُ عَلَيْهِ إِنَّ اللَّهَ
غَفُورٌ رَحِيمٌ ۝

"But whoever repents after his iniquity and reforms himself, Allāh will turn to him mercifully, for Allāh is Forgiving, Merciful." (5 : 39)

In case of *Qadhf*, the Holy *Qur'ān* says :

وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ ۝ إِلَّا الَّذِينَ
تَابُوا مِنْ بَعْدِ ذَلِكَ وَأَصْلَحُوا فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ ۝

".....And do not admit any evidence from them ever, and these it is that are transgressors. Except those who repent after this and act aright, for Allāh is Forgiving, Merciful."

(24 : 4, 5)

Actually an individual who commits a crime never gets rid of its bad consequences even after he receives punishment in this world until and unless he or she also repents and acts aright.

4. Punishments are Retributive

Islamic punishments, in the fourth place, are retributive as laid down in the Holy *Qur'ān* :

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِتْلُ فِي الْقَتْلِ ۖ الْحُرُّ بِالْحُرِّ

وَالْعَبْدُ بِالْعَبْدِ ۖ وَالْأُنْثَىٰ بِالْأُنْثَىٰ ۚ فَمَنْ عَفِيَ لَهُ بَيْنَ أَخِيهِ شَيْءٌ

فَاتَّبَاعٌ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ۚ

“O you who believe ! prescribed for you is retribution in case of the slain : the free for the free ; and the slave for the slave ; and the woman for the woman. And if something is remitted for him (the offender) by his brother (who has suffered the loss of his near one) then let this remission be adhered to with fairness, and let its payment (be made) in a goodly manner.” (2 : 178)

Its object is, therefore, to satisfy that emotion of retributive indignation which in all healthy communities is stirred up by injustice.

BASELESS CRITICISM ON THE PENAL LAW OF ISLAM

Punishments prescribed by Islam are criticized on the following grounds :

1. Punishments are severe, inhuman and barbarous.
2. A criminal being the victim of society is entitled to medical treatment rather than punishment.

1. Severity of Punishments

The Holy *Qur'ān* provides for punishments for murder, dacoity ; adultery ; theft and accusation of adultery. The punishment for murder is death but an option is given to heirs to accept compensation instead. Dacoity is punishable with death, or amputation of hands and feet or imprisonment. Theft is punishable with cutting off of hand. For adultery the punishment provided in the Holy *Qur'ān* is flogging for unmarried and stoning to death in the case of married persons.

The above punishments especially those prescribed for theft and adultery have been condemned severely by the Western people. They often say, "Can we apply today the same barbarous punishments which were inflicted long ago in the desert. Is it permissible to cut a thief's hand for five shilings" ? It is rather astonishing that this objection is raised

by those who justified most inhuman act of history, the subjection of mankind to nuclear weapons whereby hundreds of thousands of men, women, children and even babies, all wholly innocent persons, were within no time put to death. How is it that the twentieth century permits the slaughter of forty thousand innocent people in North Africa but condemns the rightful punishment of one single criminal!

Whatever view be taken of the extent of enormity of this act those who have justified it have subscribed to the proposition that the inhumanity of an act is to be decided not with reference to the act itself but with reference to its consequences. They have subscribed also to the proposition that in determining whether an inhuman act is justified the innocence of the person who is subjected to it and even the tenderness of his age is irrelevant. But if these two propositions are accepted all concentration camps, purges, genocides, third degree methods, and mass slaughtering of innocent persons are justified provided only that the person who perpetrated such inhumanities alleged that he was acting for the human welfare. It is surprising to note that while the twentieth century claims to be an advanced and civilized century not even a hundredth of the inhumanities witnessed by it were witnessed by any previous century.

It must be explained in the first instance that the amputation of hand is the maximum punishment

for theft. It is admittedly not to be imposed if the theft be of a property less than *niṣāb*. It is also not to be awarded, in accordance with the practice of the Holy Prophet (peace and blessings of Allāh be upon him) if fruit be stolen with a view of satisfying hunger. It is not applicable when the property stolen is not kept in a properly protected place. Further such punishment is never inflicted where there is the slightest doubt that the thief was impelled to commit crime due to starvation or hunger.

This is evident from a rule laid down by the second Caliph, Ḥaḍrat ‘Umar ibn al-Khaṭṭāb (Allāh be pleased with him), who is considered as one of the most prominent Jurists of Islam. Ḥaḍrat ‘Umar (Allāh be pleased with him) was known for his rigidity in enforcing the rules of *Shari‘ah*; therefore it cannot be said that he was lenient in the interpretation of the law. It should be remembered that Ḥaḍrat ‘Umar (Allāh be pleased with him) did not carry out the punishment prescribed for theft i.e., amputation of the hand, during the year of famine when there was some doubt that people might be impelled to theft by hunger.

The above-mentioned rule is best illustrated by the following episode :

“It was reported to ‘Umar (Allāh be pleased with him) that some young men in the service of Ḥaṭīb ibn Abī Balṭa‘a had stolen the she-camel of a man from the tribe of Muznah : When ‘Umar (Allāh be pleased with him) questioned

the young men they admitted the theft, so he ordered their hands to be cut. But on the second thought he said, "By God I would cut their hands if I did not know that you employ these young men and starve them so that they would be permitted to eat that which is prohibited unto them." Then he addressed their employer saying: "By God, since I have not cut their hands I am going to penalise you with a fine that shall pain you," and he ordered him to pay double the price of she-camel."

This punishment is redressive. It also illustrates a very clear and express principle: Punishment will not be inflicted where there are circumstances which impel the criminal to commit a crime." This principle is supported by the saying of the Holy Prophet (peace and blessings of Allāh be upon him): "Avoid the execution of punishment by doubt."

Secondly, the punishments provided by the *Shari'ah* are applicable only when and where a proper Islamic State exists. These punishments are a part of Islamic system and if applied apart from that system may be wholly inappropriate. The Islamic State strives to ensure a fair distribution of wealth. It is responsible for the support of every citizen, regardless of his creed, caste, race, language, colour or social status. The State is also responsible for ensuring suitable job for all citizens. Where job is not available or if an individual is incapable of working, aid will be given to him from the

Bait al-Māl (Public Treasury). According to a saying of the Holy Prophet (peace and blessings of Allāh be upon him), "The Government is the guardian of the people."

Thirdly, the criticism for determining the propriety of a punishment is whether the infliction of the punishment will lead to the public good. This good as to be assessed with reference to what happens to the convict and what happens to the society. The most important consideration is the deterrent effect of the punishment to frighten those individuals who have no reasonable motive for crime yet feel a strong yearning for committing crimes. However strong their desires may be, the punishment will surely make them think twice before committing any crime. Even in accordance with the principles accepted by modern jurisprudence a very severe punishment is justified if it will have deterrent effect.

Here an extract is given from Salmond's *Jurisprudence*, a standard work on analytical jurisprudence, wherein the learned author justifies burning alive as a punishment for all offences major or minor if such punishment would in fact deter persons from committing offences :

"In considering the measure of criminal liability it will be convenient to bestow exclusive attention upon the deterrent purpose of the criminal law, remembering, however, that the conclusions so obtained are subject to possible

modification by reference to those subordinate and incidental purposes of punishment which we thus provisionally disregard.

"Were men perfectly rational, so as to act invariably in accordance with an enlightened estimate of consequences, the question of the measure of punishment would present no difficulty. A draconian simplicity and severity would be perfectly just and perfectly effective. It would be possible to act on the Stoic paradox that all offences involve equal guilt, and to visit with the utmost rigour of the law every deviation, however, slight, from the appointed way. In other words, if the deterrent effect of severity were certain and complete, the best law would be that which by the most extreme and indiscriminating severity effectually extinguished crime. Were human nature so constituted that a threat of burning all offenders alive would with certainty prevent all breaches of the law, then this would be the just and fitting penalty for all offences from high treason to petty larceny."

It appears that the criticism on the severity of punishments is due to a failure to realize the spiritual nature of punishment. A punishment is not cruelly inflicted by one man on another. It is a sacrifice offered by Society for maintaining the purity of its moral life and it is also, at least so far as Muslims are concerned, an atonement, and both

these, that is, the sacrifice and the atonement are acts of the highest spiritual merit.

"Obedience to the law" is the basic characteristic of a true Muslim Society. Dr. Iqbal says : "The life of a Muslim is from law alone." That is the whole substance of the teachings of the Holy Prophet (peace and blessings of Allāh be upon him). There are instances of guilty persons who came to the Holy Prophet (peace and blessings of Allāh be upon him) and forced him to inflict punishments, even capital punishments on them, though no one had charged them with any offence, and though the Holy Prophet (peace and blessings of Allāh be upon him) made efforts to avoid listening to them.

That the amputation of hand does in fact prove a deterrent will appear from the conditions prevailing in a country in which it is now in force, that in Saudi Arabia. It is well known that in that country you can leave your house open and go to another town, and you can leave your shops, even jewellery shops unguarded when you go away to say your daily Prayers. Gordon Gaskell says : "Foreigners consider this a horrible punishment but even they admit that it has made Saudi Arabia the country with the lowest crime rate in the world."¹

Further it is not only in Islam that severe punishments are prescribed. Even in other religions certain crimes are punished severely. According to

1. *Reader's Digest*, February, 1967.

the Old Testament 12 offences were punishable with stoning to death. These included Sabbath-breaking, in chastity (not adultery), blasphemy, striking or even reviling a parent, false pretension to prophesy, witch-craft, idolatry and false evidence. Burning alive had been in pre-Mosaic times punishment for all adultery but in the Old Testament it was confined to adultery committed with the priest's daughter. Death by sword or spear was also the punishment for some offences. Jesus Christ said :

"And if thy right eye causeth thee to stumble pluck it out and cast it from thee : for it is profitable for thee that one of thy members should perish, and not thy whole body be cast into hell. And if thy right hand causeth thee to stumble cut it off, and cast it from thee ; for it is profitable for thee that one of thy members should perish and not thy whole body go into hell." (Matthew, 5 : 29, 30)

This passage may mean that the offending eye or hand is to be severed or it may mean that the offending member of society is to be eliminated. In either case it is a severe punishment.

The severity of punishment is determined mainly by the indignation which the criminal act causes, the importance of the need for preventing its recurrence, and the capacity for endurance, generally of the members of the society which imposes the punishment. All these three factors are on the decline in the present age. There is the greatest

indulgence for sin, the need for purity of society has greatly diminished in importance and the capacity for endurance is much less than it used to be. It is agreed that the punishment provided by the Bible relates to a particular period of human development, but it is to be observed that they were much severer than the punishments ordained by the Holy *Qur'ān* and if they were justified then, the *Qur'ānic* punishments are justified now.

In the case of fornication and adultery, the Islamic Law differs radically from the Western law. The Western law does not hold fornication by itself a crime ; it becomes a crime only when it is committed forcibly, or with a married woman. In other words, according to the Western law fornication by itself is no crime ; the real crime is rape, or the act of encroachment on the rights of the husband. Contrary to this, the Islamic Penal Law looks upon fornication by itself as a crime, and regards rape or the act of encroachment as additional crimes. This basic difference between view-points of the two systems of law gives rise to the difference in the punishment of the offence. In case of rape, the Western law rests content with the sentence of imprisonment only ; in case of fornication with a married woman it requires the fornicator to pay compensation to the husband. This punishment cannot serve as a deterrent, it rather encourages the people. That is why fornication is on the increase in the countries where this law is in force.

On the other hand the Islamic Penal Law punishes fornication and adultery so severely that the society is automatically cleansed of this crime for a long time. That is why it has never become common in the countries where the Islamic punishment for it is imposed. Once the punishment ordained by *Shari'ah* is carried out, it so deters the whole population that no one can dare commit it for years to come. In a way it performs a psychological operation on the minds of those having criminal tendencies and this reforms them automatically.

The Western people abhor the infliction of a hundred stripes. This is not because they dislike the idea of physical torture. It is because their moral sense has not yet fully developed. At first they regarded fornication as something indecent; now they look upon it as a fun, as a pastime, which amuses two persons for a little while. Therefore, they want that the law should tolerate this act, and should not regard it seriously unless the fornicator encroaches upon somebody else's freedom or legal rights. Even in the case of such an encroachment they regard it as a crime affecting the rights of one person only. Hence, they think that a light sentence or payment of compensation is sufficient punishment for the crime.

Obviously, a person who holds such a view about fornication will look upon a hundred stripes for it as a cruel punishment. But if his moral and social sense had developed, he would realize that fornication, whether it is committed with consent or force,

and whether with a married woman or with an unmarried one, is in each case a social crime that affects the whole society. This will naturally make him modify his view about punishment, so that the society is saved from the ill-effects of fornication. He will have to admit that since the motives leading to fornication lie deep in the animal nature of man and since they cannot be eradicated by mere imprisonment or inflicting of penalties, strict measures have to be adopted for their complete eradication. For it is better to subject one or a couple of persons to severe physical torture for the purpose of safeguarding hundreds of thousands of people against countless moral and social evils than to inflict light punishment on the criminals and so jeopardise the well-being of not only the society but also of the coming generations.

There is another reason for regarding the infliction of a hundred stripes as cruel. As pointed out above, the Western civilization emerged as a result of the urge of favouring the individual against the society, and it has been built up on an exaggerated notion of the rights of the individual. Therefore, even if an individual harms the society to his heart's content, the Western people do not feel ill at ease; they rather put up with it willingly in most cases. But when the individual is proceeded against with a view to protecting the rights of the society, they shudder with horror. And all their sympathies go with the individual as against the society. Moreover, like all ignorant people, the

Western people also have the special characteristic of regarding feelings as more important than reason. Therefore, when they see the individual, as in a particular case, being severely dealt with, they feel outraged at the sight of his suffering. But they do not seem to comprehend the far-reaching effects of the damage that is done to the society and the coming generations, too.

Islam recognises the strength and importunity of sex but it tries to satisfy the sexual instinct through legal means i.e., marriage. Therefore, Islam advocates early marriage and provides aid from the *Bait al-Māl* (Public Treasury) for those who wish to get married yet cannot afford to do so. On the other hand, Islam purifies society from evil temptations which excite the passions. It also prescribes lofty and noble ideals which exhaust excessive vitality and direct it into the service of public interest. It prefers that leisure time should be spent in trying to become closer and nearer to Allāh. In this manner Islam eradicates all temptations that may lead to crime. Nevertheless Islam does not hasten to inflict punishment unless the criminal has disregarded traditions and degenerated to animality by committing adultery so openly that he could be seen by four eye-witnesses, or he willingly confesses.

It may be said that the present economic, social and moral conditions make it difficult for young men to get married and consequently they are led

to adultery. There is some truth in that. But when Islam is truly applied there will be no maddening craze, evil temptations which lead young men to corruption, and there will be no pornographic motion pictures, newspapers or songs. No exciting temptation will be walking along the streets. There will be no poverty which prevents people from marriage. It is then and only then that people may be called on to virtuous and they can be virtuous. In such a case punishment may be inflicted on offenders because they have no excuse or justification. Thus Islam, in the first place, tries to wipe out all circumstances and motives that may lead to crime.

When considering the question as to whether punishments provided by Islamic Law are inhuman, it will be appropriate to compare such punishments with the punishments which were in force in the Western countries till early nineteenth century. The punishments prescribed by Islamic Law were imposed in the 7th century A.D., and from what has been stated above it will appear that death penalty was provided in four cases *i.e.*, murder, dacoity, apostasy and adultery. It should be remembered that in Islam murder is a crime which can be forgiven through compromise. And death sentence is awarded only when the slain's relatives demand it. *Sūra Ma'ida* verse 33 recommends four punishments for dacoity, and death sentence is awarded only when the dacoit commits murder along with robbery. As for adultery (by married persons) the

Holy Prophet (peace and blessings of Allāh be upon him) ordered stoning to death for it. And throughout the Rightly-guided Caliphate this was done. The Hanafite school of thought are unanimous on this. But what were the punishments provided by the Western countries? To take as an example the case of one of them, that is England, upto early nineteenth century there were two hundred and twenty-three offences, the penalty for which was death. These included theft when the value of stolen property was more than one shilling, rioting, destroying banks, bridges, or floodgates, offences against administration of justice, offences against public health, offences against public revenue, rape, forcible abduction and other sexual offences. Treason was severely punishable. Even now in the case of treason the sovereign can order that the head of the convict be cut off while he is still alive.

It will be observed that in severity there is not much difference between the punishments prescribed by Islam and those in force in England till early 19th century. Even at the present time there are countries where punishments are much rigorous than those prescribed by the *Shari'ah*. In Soviet Russia for instance, there is death penalty by shooting for some categories of theft, professional counterfeiting, aggravated forms of rape and acceptance of bribe.

It is because some Europeans have not studied the reality of the Islamic concept of crime and

punishment that they consider the punishments prescribed by Islam as barbarous and degrading to human dignity. They wrongly imagine that such punishments—like the European civil punishments—will be inflicted every day and on a mass scale. They also fancy that the Islamic society indulges in daily execution of flogging, hand-cutting and stoning to death. But the fact is that such deterrent punishments have been executed very rarely. The fact that the punishment for theft has been executed only six times throughout a period of four hundred years is a clear proof that such punishment was primarily meant to prevent crime.

2. Concept of Mental Sickness

Western countries regard the individual as the centre of life. Such countries straiten the state right to restrict the freedom of individual. This attitude is reflected in their concept of crime and punishment. They sympathize with criminals and treat them gently because they are victims of corrupted circumstances, psychological complexes and nervous disorders which they could not overcome. Therefore, such countries are inclined to reduce penalties until—especially in moral offences—they are no longer regarded as punishment.

At this stage psycho-analysis comes in to justify or explain away the crime. It will be noted that Freud was the champion of the historical change which regarded a criminal as the victim of the sexual complexes resulting from the repression of the sexual

instincts by society, religion, morality and tradition. Later all schools of psycho-analysts followed Freud's example but many of them did not agree with him that sexual instinct was the centre of life. All such schools regard a criminal as a passive creature who is the victim of general and personal circumstances amidst which he was brought up. They believe in what is called "Psychological determinism" that is to say, a man has no freedom of will or action with respect to the psychological energy which acts according to a predetermined manner.

Thus the public opinion in the West (which is considered to be the fountainhead of law there) and the legislators and courts have been much influenced by the concept that in fact crime is not a deliberate act but is the result of the criminal's mental sickness, who instead of being punished should be treated sympathetically. Although this impression has not resulted in the replacement of prisons by mental hospitals but it has definitely led to a softening of attitude towards moral crime and to a great extent this is responsible for the increasing rate of crime in Western countries. Apart from the soundness of the argument put forth in support of this concept when one sees crime spreading with alarming rate in the countries where this concept has been accepted and almost extinct where Islamic regulations are in force, one is forced to ask that after all what sort of a "mental sickness" is this which is increasing in the West and receding in Saudi Arabia? If crime is actually a sickness and

punishment is no cure for it then in Saudi Arabia too its patients should increase with the same rate as they are in the West. But when we see that in Saudi Arabia crime has almost disappeared then surely this fact shows that the proper cure for this sickness is not the one recommended by the Western people ; and a surer cure is that *Qisās* (retribution) should be meted out to the murderers in the open, the hands of the thieves should be chopped off in a public gathering, and those who commit adultery should be whipped in public. This would work as psychotherapy on the minds of those who harbour criminal tendencies.

CHAPTER 2

ISLAMIC LAW OF EVIDENCE (*Shahadah*)

The law of evidence is very clearly laid down in all books of Islamic Law, especially in the *Hidāya* and the *Durru'l-Mukhlār*.

It is the duty of witnesses to bear testimony, and it is not lawful for them to conceal it, when the party concerned demands it from them. The Holy *Qur'ān* says :

وَلَا يَأْبَ الشُّهَدَاءُ إِذَا مَا دُعُوا ۖ

“Let not witnesses withhold their evidence when it is demanded of them.” (2 : 282)

And again :

وَلَا تَكْتُمُوا الشَّهَادَةَ ۚ وَمَنْ يَكْتُمْهَا فَإِنَّهُ إِنَّمْ قَتَلَ ۚ

“And never conceal evidence for he who conceals it, has a sinful heart.” (2 : 283)

In cases likely to result in corporal punishment, witnesses are at liberty either to give or withhold their testimony as they please ; because in such case they are distracted between two laudable actions ;

namely the establishment of the punishment, and the preservation of the criminal's character. Concealment of an offence of others is moreover, preferable because the Holy Prophet (peace and blessings of Allāh be upon him) said to a person that had borne testimony, "Verily, it would have been better for you if you had concealed it"; and also because he elsewhere said, "Whoever conceals the vices of his brother Muslim, shall have a veil drawn over his own crimes in both the worlds by Allāh." Besides, it has been inculcated both by the Holy Prophet (peace and blessings of Allāh be upon him) and his Companions as commendable to assist in the prevention of corporal punishment; and this is an evident argument for the concealment of such evidence as tends to establish it. It is incumbent, however, in the case of theft, to bear evidence to the property by testifying that "a certain person took such property," in order to preserve the right of the proprietor. However the word "taken" must be used instead of "stolen", to the end that the crime must be kept concealed. Besides, if the word "stolen" were used, the thief would be rendered liable to amputation; and as where amputation is incurred, there is no responsibility for the property, the proprietor's right would be destroyed.

The evidence required in a case of adultery is that of four men, as has been ordained in the Holy *Qur'ān* (24 : 4) and the testimony of a woman in such a case is not admitted. Al-Zubrī says, "During the time of the Holy Prophet (peace and blessings of

Allāh be upon him) and his two immediate successors, it was an invariable rule to exclude the evidence of women in all cases inducing punishment or retaliation," and also because the testimony of women involves a degree of doubt, as it is merely a substitute for evidence, being accepted only where the testimony of men cannot be had. It is, therefore, not admitted in any matter liable to drop from the evidence of doubt.

The evidence required in other criminal cases is that of two men, according to the text of the Holy *Qur'ān*; and the testimony of women is not admitted, on the strength of the tradition of Al-Zuhri above quoted. In all other cases the evidence required is that of men, or of one man and two women, whether the case relates to property or to other rights, such as marriage, divorce, agency, executorship or the like. The Imām al-Shāfi'ī has said that the evidence of one man and two women cannot be admitted, excepting in cases that relate to property, or its dependencies, such as hire, bail, and so forth; because the evidence of woman is originally inadmissible on account of their weakness of understanding, their want of memory and incapacity of governing, whence it is that their evidence is not admitted in criminal cases.

In all rights whether of property or otherwise, the probity of the witness, and the use of the word "*ashhadu*" (I bear witness) is absolutely requisite, even in the case of the evidence of women. If, therefore, a witness should say, "I know" or "I

know with certainty" without making use of the word "*ashhadu*", in that case his evidence cannot be admitted. With respect to the probity of the witness, it is indispensable because it is written in the Holy *Qur'ān* :

وَأَشْهِدُوا ذَوَيْ عَدْلٍ

"Take the evidence of two just men." (65 : 2)

It is also because the probity of the witnesses induces a probability of the truth.

If the defendant throws a reproach on the witnesses, it is in that case incumbent on the Qāḍī to institute an enquiry into their character, because, in the same manner as it is probable that a Muslim abstains from falsehood as being a thing prohibited in the religion he professes, so also is it probable that a Muslim will not unjustly reproach another.

It is not lawful for a person to give evidence on such matters as he has not actually seen personally.

The evidence of any person who is property—that is to say, a slave, male or female, is not admissible, because testimony is of an authoritative nature ; and as a slave has no authority over his own person, it follows that he can have no authority over others, a fortiori.

The testimony of a person that has been punished for false accusation (*qadhf*) is inadmissible.

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The Holy *Qur'ān* says :

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ
تَمْنِينَ جَلْدَةٍ وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ
إِلَّا الَّذِينَ تَابُوا مِنْ بَعْدِ ذَلِكَ وَأَصْلَحُوا

"But as to those who accuse married persons of adultery and produce not four witnesses of the fact, scourge them with eighty stripes, and receive not their testimony for ever ; for such men are wicked transgressors,—excepting those who shall afterwards repent and make amends."

(24 : 4, 5)

If an infidel who has suffered punishment for *qadhf* (false accusation) should afterwards become a Muslim, his evidence is then admissible ; for although, on account of the said punishment he had lost the degree in which he was before qualified to give evidence (that is, in all matters that related to his own sect), yet by his conversion to the Islamic faith he acquires a new competency in regard to evidence (namely, competency to give evidence relative to Muslims), and which is not affected by any matter that happened prior to the circumstances which gave birth to it.

Testimony in favour of a son or grandson, or in favour of a father or grandfather, is not admissible, because the Holy Prophet (peace and blessings of Allāh be upon him) has so ordained. Besides, as there is a kind of communion of benefits between

these degrees of kindred, it follows that their testimony in matters relative to each other is in some degree a testimony in favour of themselves, and is, therefore, liable to suspicion.

So also the Holy Prophet (peace and blessings of Allāh be upon him) said, "We are not to credit (in civil cases) the evidence of a wife concerning her husband, or of a husband concerning his wife ; or of a slave concerning his master ; or of a master concerning his slave ; or, lastly, of a hirer concerning his hireling."

The testimony of a convict or a person who has committed a great crime, such as induces punishment, is not admissible, because in consequence of such crime he is unjust. The testimony of a person who receives usury is inadmissible ; and so, also, of one who plays for a stake at dice or chess.

The evidence of a person who openly inveighs against the Companions of the Holy Prophet (peace and blessings of Allāh be upon him) and their disciples is not admissible, because of his apparent want of integrity. It is otherwise, however, where a person conceals his sentiments in regard to them, because in such case the want of integrity is not apparent.

The testimony of a *Dhimmi* with respect to each other is admissible, notwithstanding they be of different religions.

The Imām Abū Hanīfa is of the opinion that a false witness must be stigmatised, but not chastised

with blows. The two disciples are of the opinion that he must be scourged and confined ; and this also is the opinion of the Imām al-Shāfi'i.

The mode of stigmatising a false witness is this : If the witness be a sojourner in any public street or market-place, let him be sent to that street or market-place ; or if otherwise, let him be sent to his own tribe or kindred, after the evening Prayers (as they are generally assembled in greater number at that time than any other) ; and let the stigmatiser inform the people that the Qāḍi salutes them, and informs them that he has detected this person in giving false evidence ; that they themselves, must therefore, beware of him and likewise desire others to beware of him.

If witnesses retract their testimony prior to the Qāḍi passing any decree, it becomes void ; if, on the contrary, the Qāḍi passes a decree, and the witnesses afterwards retract their testimony, the decree is not thereby rendered void.

The retraction of evidence is not valid, unless it be made in the presence of the Qāḍi.

6. Public peace and tranquillity

7. Decency or morals

Punishments

The Penal Laws of Islam are called *Ḥudūd* (plural of *Hadd*) in *Hadith* and *Fiqh*. *Hadd* means prevention, hinderance, restraint, prohibition and hence a restrictive ordinance or statute of Allāh, respecting things lawful and unlawful.

Punishment is divided into three classes :

(1) *Hadd*, (2) *Qisās*, (3) *Ta'zīr*.

Hadd

The *Hadd* is a punishment the limits of which have been defined by the Holy *Qur'ān* and the *Sunnah*. The following belong to this class :

1. ADULTERY : Punishment for adultery is stoning to death (*Rajm*) in case of a married person.
2. FORNICATION (*Zinā*) : For an unmarried person punishment for fornication is one hundred stripes.
3. FALSE ACCUSATION (*Qadhf*) : Insinuating a false charge of adultery against a married man or a woman for which the offender must receive eighty stripes.
4. APOSTASY (*Irtidād*) : Renunciation or abandonment of Islam by one who professes Islamic Faith. It is punishable with death.

CHAPTER 3

CRIMES AND PUNISHMENTS IN ISLAM

Crimes

A criminal act is defined as one that infringes public right ; a right whose infringement leaves wider repercussions on the society.

From the viewpoint of Islam when certain primary public rights are violated the wrong is called *Masā'at*, that is, crime or offence ; and it gives rise to certain substitutory public rights in the form of '*Uqūbat* or punishments. '*Uqūbat* denotes the punishments instituted in the Holy *Qur'ān* and Traditions of the Holy Prophet (peace and blessings of Allāh be upon him).

According to the Islamic Law criminal offences mostly concern :

1. Person
2. Property
3. Honour
4. State
5. Religion

5. DRINKING WINE (*Khamr*): For which the offender must receive eighty stripes.
6. THEFT (*Sariqa*): It is punishable with cutting off the hand.
7. DACOITY, ROBBERY (*Qat' al-Tariq*): For robbery only, the loss of hands and feet, and for robbery with murder, death either by sword or crucifixion.

Qisās

: *Qisās* stands for the return of life for life in a case of murder. Retaliation (*Qisās*) is that punishment which although fixed by law, can be remitted by the person offended against, or in the case of a murdered person, by his heirs. It is applicable to cases of murder and wounding.

Ta'zir

Ta'zir is the punishment which is left to the discretion of the court in regard to the form and measure in which such punishment is to be inflicted. It is applicable to those crimes for which *Ḥadūd* and *Kaffāra* have not been prescribed.

The punishments described above are the maximum punishments for the above mentioned crimes. These can be reduced keeping in view the circumstances in which the crimes were committed, the nature of evidence, and the motive of the criminal with which he committed the crime.

CHAPTER 4

ADULTERY (ZINĀ)

Adultery is an evil which opens the road to other evils. Adultery is not only shameful in itself and inconsistent with any self-respect or respect for others, but it induces to invite many other evils. It destroys the basis of the family : it works against the interests of children born or to be born : it may lead to murders and feuds and loss of reputation and property, and may also loosen permanently the bonds of society. Not only should it be avoided as a sin, but any approach or temptation to it should be avoided.

The Holy *Qur'ān* describes it as a foul thing and an evil way, and the Muslims are prohibited from going near it :

وَلَا تَقْرَبُوا الزِّنَىٰ إِنَّهُ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا ۝

“Nor come nigh to adultery for it is a wickedness (or shameful deed) and an evil path.” (17 : 32)

The term *Zinā* includes both adultery and fornication, but there is a difference in the punishment for these two offences.

Adultery is established before a Qāḍi, either by

proof or confession. To establish it upon proof, four witnesses are required.

Punishment

Adultery is an offence both against the person and the honour of an individual. The punishment prescribed by the Holy *Qur'ān* is as under :

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةً جَلْدَةً وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ ٥

“The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes : Let not compassion move you in their case, in a matter prescribed by Allāh, if ye believe in Allāh and the Last Day : And let a party of the believers witness their punishment.” (24 : 2)

Zinā includes sexual intercourse between a man and a woman not married to each other. It, therefore, applies both to adultery (which implies that one or both of the parties are married to a person or persons other than the ones concerned) and to fornication, which in its strict signification implies that both parties are unmarried.

Definition of the state of Marriage which subjects an Adulterer to Rajm (Stoning to death)

The state of marriage necessary to induce lapidation requires that the adulterer be of sound

understanding and mature age, and a Muslim, free, and who has consummated in a lawful marriage with a woman at a time when she is also a sane and free adult Muslim. This is the definition of al-Imām Abū Ḥanifa and al-Imām Abū Yūsuf. According to al-Imām Muḥammad and al-Imām al-Shāfiʿī the state of marriage in question requires simply that the adulterer be free, and a Muslim, and one who has consummated in a lawful marriage with a woman of the same description.

It should be borne in mind that the word *Zinā* is used for illicit sexual relation whether between two persons either of whom is married to the third person or between two unmarried persons, or between one married and one unmarried person. In the English language there is a difference between adultery and fornication. Adultery means illicit sexual intercourse of two persons either of whom is married, whereas fornication means illicit sexual intercourse between two unmarried persons.

Islam awards two different punishments for two different categories of illicit sexual relation. For fornication (i.e., between two unmarried persons) it prescribes one hundred stripes both for the man and the woman (24 : 2). And for adultery it is stoning to death as we find in the *Hadith*.

It should be remembered that Islam is not the only religion which has prescribed such severe punishment for such a serious offence but for preservation of the moral health of society so many

other religions have prescribed such serious punishments. Here are some of the verses of the Old Testament :

"And the man that committeth adultery with another man's wife, even he that committeth adultery with his neighbour's wife, the adulterer and the adulteress shall surely be put to death."

(*Leviticus*, 20 : 10)

"If a damsel that is a virgin be betrothed unto a husband, and a man find her in the city, and lie with her ; then ye shall bring them both into the gate of city, and ye shall stone them with stones that they die."

(*Deuteronomy*, 22 : 23)

Apart from the *Bible* the other classical works on Christianity state :

"The mode of execution varied with the standing of the woman ; a guilty wife was to be put to death, i.e., strangled, along with her paramour ; while a betrothed woman who was seduced was to be stoned."¹

"In the law the only recognized form of capital punishment is by stoning...it fell to the witness to cast the first stone."²

As we find in the *Hadīth*, punishment for adultery is stoning to death. 'Abdullāh b. Mas'ūd (Allāh be

1. Hastings, *Dictionary of the Bible*, Vol. III, p. 273.

2. Cheyne and Black, *Encyclopaedia Biblica*, C. 2722.

pleased with him) reported Allāh's Messenger (peace and blessings of Allāh be upon him) as saying : It is not permissible to take the life of a Muslim who bears testimony (to the fact) that there is no god but Allāh, and I am the Messenger of Allāh, but in one of the three cases : the married adulterer, a life for life and the deserter of his *Din* (Islam), abandoning the community.

The words of the *Ḥadith* "*al-Thayyib al-Zānī*" (the married person) elucidate the point that the punishment prescribed in the Holy *Qur'ān* for this offence pertains to unmarried fornicators, and not the married ones. This also shows that it is through the Holy Prophet (peace and blessings of Allāh be upon him) that correct implications and meanings of the *Qur'ān* are determined. Thus there is no contradiction between the injunctions of the Holy *Qur'ān* and the *Sunnah* as both relate to two different categories of offenders, the reason being clear. When two unmarried persons indulge in sexual intercourse they blast the moral health of the society, but when the two persons either of whom is married commit adultery they commit a more serious offence, by not only blasting the moral fibres of the human race, but also destroying the sanctity of wedlock.

There is a difference of opinion amongst the jurists as to the precise nature of punishment prescribed for adultery. There is, however, no difference of opinion that the punishment prescribed for married persons is stoning to death and for unmarried persons it is one hundred lashes. The

difference is whether it is essential to combine lashing with stoning as recorded in the *ḥadīth* for married persons and lashing with exile for unmarried offenders.

‘Ubāda b. al-Ṣāmit reported Allāh’s Messenger (peace and blessings of Allāh be upon him) as saying : Receive (teaching) from me, receive (teaching) from me. Allāh has ordained a way for those (women). When an unmarried male commits fornication with an unmarried female (they should receive) one hundred lashes and banishment for one year. And in case of married male committing adultery with a married female, they shall receive one hundred lashes and be stoned to death.

The Imām Aḥmad, Dāwūd al-Zāhirī and Ishāq b. Rāhawai on the authority of the *ḥadīth* recorded above, assert that in the case of married persons there are two punishments, i.e., lashing and stoning, and both should be awarded.

The other jurists who form an overwhelming majority are of the opinion that it is not advisable to award two punishments together as it was not done by the Holy Prophet (peace and blessings of Allāh be upon him) himself, but only in one case and that too under exceptional circumstances. It is narrated on the authority of Jābir b. ‘Abdullah that a person committed adultery, and the Holy Prophet (peace and blessings of Allāh be upon him) punished him with one hundred lashes, but later on, it was found out that the offender was a married

one and then the Holy Prophet (peace and blessings of Allāh be upon him) awarded him the punishment of stoning to death. Opinions differ whether two punishments should necessarily be awarded to those who are unmarried and commit fornication. According to al-Imām al-Shāfi'i, al-Imām Aḥmad, Dāwūd al-Zāhiri, Sufyān al-Thaurī and Ibn Laila, this punishment is essential for this crime. According to the Imām Mālik and Imām Auzā'i, the male should get one hundred lashes and exile for one year, whereas in the case of female only one hundred lashes are enough and there is no need of exile. Exile implies that the offender should be banished from the habitation and sent to a place where the shortening of Prayer is permissible. Zaid b. 'Ali and al-Imām Ja'far Ṣādiq are of the opinion that the purpose of banishment can be served also by imprisonment.

The Imām Abū Hanīfa and his eminent disciples al-Imām Abū Yūsuf and al-Imām Zufar and al-Imām Aḥmad are of the opinion that in case of fornication committed by unmarried persons prescribed punishment is one hundred lashes. Any addition to it is a sort of *ta'zir* given by a Qāḍi at his own discretion. For example, if the Qāḍi finds that the persons who have committed adultery are immoral and the relations between the male and female are so deep that they are liable to commit this offence again, then the Qāḍi can impose the punishment of banishment for one or both of them.

It is thus clear on the basis of the Holy *Qur'ān* and the *Sunnah* that in case of *Zinā*, if the parties are unmarried, a punishment of one hundred stripes each shall be inflicted, and if they are already married, then they shall be "stoned to death."

Some people hold that the words used in the Holy *Qur'ān* are of a general nature and include all kinds of *Zānīs* (adulterers or fornicators), married or unmarried, free or slave. Hence this distinction is not supported by the Holy *Qur'ān*. The punishment of one hundred lashes alone is prescribed, the word *Rajm* (stoning to death) is nowhere mentioned in the Holy *Qur'ān* as punishment for *Zinā*. Further the traditions relied on in support of stoning to death are discordant and fail to establish that any such punishment was awarded after the revelation of the *Surā al-Nūr*. In a Tradition quoted in the *Ṣaḥīḥ* of al-Bukhārī and Muslim, 'Abdullah b. 'Abbās reported that once 'Umar b. al-Khaṭṭāb (Allāh be pleased with him) sat on the pulpit of Allāh's Messenger (peace and blessings of Allāh be upon him) and said: "Verily, Allāh sent Muḥammad (peace and blessings of Allāh be upon him) with truth and He sent down the Book upon him, and the verse of stoning was included in what was sent down to him. We recited it, retained in our memory and understood it. Allāh's Messenger (peace and blessings of Allāh be upon him) awarded the punishment of stoning to death (to the married adulterer and adulteress) and after him, we also awarded the punishment of stoning to death.

I am afraid that, with the lapse of time, the people (may forget it) and may say : We do not find the punishment of stoning to death in the Book of Allāh, and thus go astray by abandoning this duty prescribed by Allāh. Stoning to death is a duty laid down in Allāh's Book for married men and women who commit adultery when proof is established." (Muslim)

The Book is before everybody and there is no reference to *Rajm* whatsoever. The 'Allāma al-Suyūṭī after a thorough examination of all the traditions on the subject came to the conclusion : "The assertion that a verse about *Rajm* was revealed is based on Traditions which are *āḥād* (isolated) and these cannot supersede the Qur'ānic injunction or cast doubt on its purity."¹

The question now arises if the punishment prescribed in the *Sūra al-Nūr* is deemed as final, the punishment of stoning is to be treated as abrogated and if it is proved that the Holy Prophet (peace and blessings of Allāh be upon him) awarded the punishment of stoning for adultery after the revelation of the *Sūra al-Nūr*, then the punishment prescribed in the Holy *Qur'ān* (flogging) is to be treated as amended. Such people are ignorant of the fact that the punishment prescribed in the Holy *Qur'ān* relates to unmarried persons and the punishment of stoning is prescribed by the Holy Prophet (peace and blessings of Allāh be upon him) for

1. Al-Suyūṭī, *Itqaw*, Vol. II, p. 26.

married persons. Al-'Allāma Badr-ud-Dīn al-'Ainī has clearly stated that the Holy Prophet (peace and blessings of Allāh be upon him) awarded the punishment of stoning after the revelation of the *Sūra al-Nūr*. This *Sūra* was revealed in connection with the incident of *Ifk* and thus its revelation could not be beyond the sixth year of Hijra. There are, no doubt, other statements which tell us that it was revealed earlier than that, say in the fourth or fifth year of Hijra, but none claims it to be revealed after the sixth. There is a *ḥadīth* which shows Abū Huraira being present on the occasion when this punishment was given to an offender. He embraced Islam in the seventh year of Hijra.¹

The majority of jurists, the four Imāms, Abū Hanifa, Shāfi'i, Malik and Aḥmad and other learned jurists hold that the order for stoning to death still exists. This question was raised before the Holy Prophet (peace and blessings of Allāh be upon him). He as the best interpreter of the Holy *Qur'ān* said that, according to the Book, a married adulterer and a married adulteress shall be put to death. Who can be a greater authority in interpreting the Holy *Qur'ān* than the Prophet himself? This ordinance was carried out by Haḍrat Abū Bakr, 'Umar and other Caliphs that came after them. Had the capital sentence in case of married culprits been abrogated, these Caliphs would not have followed the command of the Prophet (peace

1. Badr-ud-Dīn al-'Ainī, *Umdat-ul-Qāri*, Vol. XXIII, p. 291.

and blessings of Allāh be upon him). Although capital sentence has got no clear mention in the Qur'ānic verses now extant, there is no doubt that there is indication of such a capital sentence in the following verse :

وَالَّتِي يَأْتِيَنَّ الْفَاحِشَةَ مِنْ نِسَائِكُمْ فَمَا تُشْهِدُونَ عَلَيْهِنَّ أَرْبَعَةً
مِنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّى يَتَوَفَّيَهُنَّ الْمَوْتُ
أَوْ يُجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا ۝

“If any of your women be guilty of indecency, call for four witnesses from among yourselves to testify against them. If they give evidence and prove the guilt, then confine them to their houses until death comes to them or Allāh opens some other way out for them.” (4 : 15)

Here there is the sentence of death. ‘Way’ has been interpreted as the prescribed sentence. In addition to this verse there are clear authentic traditions to show that the order of capital sentence is still in force.

Abū Umāma reported that ‘Uthmān bin ‘Affān (Allāh be pleased with him) ascended on a high place on the day when the rebels surrounded his house and said : I recite to you in the name of Allāh. Don’t you know that the Messenger of Allāh (peace and blessings of Allāh be upon him) said : It is not lawful to take blood of a Muslim except for

one of the reasons ; fornication after marriage, or infidelity after Islam, or wrongful murder of a person for which he is to be killed. By Allāh, I have not committed fornication either in the Days of Ignorance or in Islam, nor have I turned retrograde since I took allegiance to the Messenger of Allāh (peace and blessings of Allāh be upon him), nor have I killed any person whom Allāh has made unlawful. So on what account will you put me to death ?
(Tirmidhi, Nasā'i, Ibn Majah)

Hādrat 'Ā'isha (Allāh be pleased with her) reported Allāh's Messenger (peace and blessings of Allāh be upon him) as saying : It is not lawful to shed the blood of a Muslim except where a married person commits adultery, a person who apostatises after accepting Islam or one who kills a person.
(Nasā'i)

Hādrat 'Uthmān (Allāh be pleased with him) reported Allāh's Messenger (peace and blessings of Allāh be upon him) as saying : It is not lawful to shed the blood of a Muslim except for three crimes : Firstly who fornicates after marriage, punishment for which is stoning to death (*Rajm*), secondly who deliberately kills a person, for which *Qisās* is applicable, thirdly a person who apostatises after accepting Islam, his punishment is death. *(Nasā'i)*

The Kharjites and those other people who do not believe in the stoning to death of an adulterous woman have quoted the following verse to prove

their own point of view :

وَإِذَا أَحْصَيْنَ فَإِنْ أَتَيْنَ بِفَاحِشَةٍ فَعَلَيْهِنَّ نِصْفُ مَا عَلَى الْمُحْصَنَاتِ

“Then if they (the slave girls) are guilty of indecency, after they have been fortified by wedlock, they shall incur the half of the punishment prescribed for free woman.” (4 : 25)

They argue that in this verse, the punishment prescribed for an adulterous married slave girl is half of the punishment prescribed for a free “married” Muslim woman. If the punishment for an adulterous free married woman had been stoning her to death, it is clear that there could be no half of this for a guilty slave girl. This verse, is, therefore, according to them, a conclusive proof that the punishment of stoning to death does not exist in Islam.

The fallacy of the above argument becomes obvious, if one uses common sense in the application of the appropriate meaning of “*muḥṣanāt*”. In the case of the guilty slave girl, it has been used in the sense of “married woman”, enjoying the protection of the husband, as is plain from the subsequent clause, “after they have been fortified by wedlock.” But in the case of guilty Muslim woman, half of whose punishment is to be given, it means “free Muslim woman”, enjoying the protection of her family, and does not mean a “free married Muslim woman”, as has been misconceived by the opponents of the punishment of stoning.

This also shows that the punishment of one hundred stripes prescribed for a woman guilty of

fornication is for an un-married free Muslim woman, half of which has been prescribed for a slave married girl. It is obvious that an adulterous married free woman deserves capital punishment for this heinous crime because she enjoys the double protection of the family and of the husband, and that punishment is "stoning her to death." Though the *Qur'ān* does not explicitly mention the punishment of stoning her to death, it does indicate it in a subtle manner, which the Holy Prophet (peace and blessings of Allāh be upon him) understood and enforced. And who else can understand the *Qur'ān* better?

From the above it is thus proved beyond shadow of doubt that in case of married male and female, the punishment for adultery is nothing short of death.

Stoning to Death of Non-Muslim in case of Adultery

'Abdullah b. 'Umar reported that a Jew and a Jewess were brought to Allāh's Messenger (peace and blessings of Allāh be upon him) who had committed adultery. Allāh's Messenger (peace and blessings of Allāh be upon him) came to the Jews and said: What do you find in *Torah* for one who commits adultery? They said: We darken their faces and make them ride on the donkey with their faces turned to the opposite direction (and their backs touching each other), and then they are taken round (the city). He said: Bring *Torah* if you are

truthful. They brought it and recited it until when they came to the verse pertaining to stoning, the person who was reading placed his hand on the verse pertaining to stoning, and read (only that which was) between his hands and what was subsequent to that. 'Abdullah b. Salam who was at that time with the Messenger of Allāh (peace and blessings of Allāh be upon him) said: Command him (the reciter) to lift his hand. He lifted it and there was, underneath that, the verse pertaining to stoning. Allāh's Messenger (peace and blessings of Allāh be upon him) pronounced judgment about both of them and they were stoned. 'Abdullah b. 'Umar said: I was one of those who stoned them, and I saw him (the Jew) protecting her (the Jewess with his body).

(Muslim)

There is difference of opinion amongst the jurists whether or not a non-Muslim living in the Islamic State should be punished according to the Islamic Shari'ah for the offence of adultery. Imām Shāfi'i, Imām Abū Yūsuf and Imām Aḥmad are of the opinion that a married *Dhimmi* would receive the same punishment as is given to a married Muslim if he commits adultery. But Imām Abū Hanifa and Imām Mālik do not subscribe to this view and hold that this punishment should be accorded to a Muslim only and not to the non-Muslim. They argue that this punishment can be justifiably imposed upon persons who are *Muḥṣan* (fortified). One comes in this state of moral protection on three basis;

- (a) He has firm conviction in Allāh and the Hereafter which is essential for promoting the sense of inner piety in him.
- (b) He is a free man and finds no hinderance in adopting the moral and legitimate means to satisfy his sexual instinct.
- (c) He is married.

The person is fortified morally by these three methods. The non-Muslim is deprived of the first means, belief in the Unity of Allāh and Hereafter. Thus he is not completely fortified and hence it is not fair to punish him like one who is fortified. This view is supported on the authority of Ibn 'Umar and is recorded by Ishāq b. Rahawai in his *Musnad* and Daraqutni in his *Sunan* in which it has been made clear : He who associates with Allāh is not a fortified person.

That the Holy Prophet (peace and blessings of Allāh be upon him) stoned the Jew and the Jewess does not lend support to those who are in favour of awarding the same punishment to the non-Muslims, since the Holy Prophet (peace and blessings of Allāh be upon him) gave decision according to the Law of *Torah*, in compliance with their own wish.

Mode of Evidence

The prescribed punishment can be inflicted only when the offence of adultery has been established by four pious up-right witnesses. When witnesses

come forward, it is necessary that they should be examined particularly concerning the nature of the offence. When the witnesses shall have borne testimony completely, declaring that "they have seen the parties in the *very act* of carnal conjunction", and the integrity of such evidence is also known to the Qāḍi from both an open and a secret purgation, let him then pass sentence prescribed for adultery, according to such evidence.

Similarly, the confession is valid only when the man is making his confession without any external pressure and he has his wits about him.

Some of the jurists hold that if a person retracts his confession, his retraction must be credited, and he must be forthwith released.

The confession which establishes adultery is made by a person of sound mind and of mature age acknowledging himself (or herself) guilty of adultery four times, at four different appearances, in the presence of the Qāḍi, he declining to receive the confession, and sending the person away the first, second and third time. The maturity and sanity of the person confessing are the additional conditions, because the declaration of an infant or an idiot is not worthy of any credit, or because the acknowledgement of such is not sufficient to induce a sentence of adultery. The condition of the confession being made four times at four different appearances is agreeable to most of the jurists. According to the Imām al-Shāfi'ī, a single confes-

sion, in a case of adultery, is sufficient, because he considers the law to be the same here as in all other cases, the confession or acknowledgement of any circumstance being the means of disclosing or discovering that which is so confessed or acknowledged ; and a single confession is fully adequate to this purpose, a repetition being of no manner of use, since the disclosure or discovery is not in any degree increased or amplified by it : contrary to the plurality of witnesses, as the abundance of witnesses is a means of removing all doubt with respect to their veracity, and of affording fuller satisfaction to the mind ; whereas, by repetition of the declaration of a single person (as in case of confession), no such additional satisfaction is obtained. The arguments of most of the jurists in opposition to what is here advanced by the Imām al-Shāfi'ī are two-fold : First the case of Mā'iz on whom the Holy Prophet (peace and blessings of Allāh be upon him) would not decree any punishment until he should have made confession of his offence at four different times in four different appearances.

'Abdullah b. Buraida reported on the authority of his father that Mā'iz b. Mālik al-Aslamī came to Allāh's Messenger (peace and blessings of Allāh be upon him) and said : "Allāh's Messenger, I have wronged myself ; I have committed adultery and I earnestly desire that you should purify me." He turned him away. On the following day, he (Mā'iz) again came to him and said : "Allāh's Messenger, I have committed adultery." Allāh's

Messenger (peace and blessings of Allāh be upon him) turned him away for the second time, and sent him to his people saying: "Do you know if there is anything wrong with his mind?" They denied of any such thing in him and said: "We do not know him but as a wise good man among us, so far as we can judge." He (Mā'iz) came for the third time, and he (the Holy Prophet) sent him away as had done before. He asked about him and they informed him that there was nothing wrong with him or with his mind. When it was the fourth time, a ditch was dug for him and he (the Holy Prophet) pronounced the judgment on him and he was stoned.¹

Secondly, as in evidence to adultery four witnesses are requisite, so also in the confession thereof four repetitions are requisite.² Thus the confession for four times has an implied reference to four witnesses in case of adultery.

Opinions differ whether pregnancy alone is sufficient to inflict upon a woman the punishment prescribed for adultery. According to Haḍrat 'Umar (Allāh be pleased with him), pregnancy furnishes a sufficient proof of the act of fornication on the part of a woman who does not have husband or master in case she is a slave-woman. The Mālikis also hold this view. But the majority of the jurists

1. Imām Muslim, *Ṣaḥīḥ Muslim*, Chapter "*Kitāb Al-Hudūd*."

2. Charles Hamilton, *The Hedaya*, p. 177.

does not subscribe to this opinion and asserts that mere pregnancy (without witnesses or confession on her part) does not make a woman liable to such a severe punishment. The spirit of the Shari'ah shows that the benefit of doubt goes to the offender even if it is very slight. There is a *hadith* of the Holy Prophet (peace and blessings of Allāh be upon him) which sheds light on this spirit. He said : Ward off the punishments as far as you find it possible to ward off. There is another *hadith* in which he is reported to have said : Ward off punishments from the Muslims as far as it lies in your power ; if there is any other way out (for the offender) to be let off, then let him off, for if the Imām commits error in forgiving, that is better than his error in inflicting punishment. (*Tirmidhi*)

Mode of Execution

When an adulterer is to be stoned to death, he should be carried to some barren place void of houses or cultivation, and the *Rajm* (lapidation) should be executed, first by the witnesses, then by the Qāḍi, and lastly by the rest of the by-standers. When a woman is stoned, a hole or excavation should be dug to receive her, as deep as her waist, because the Holy Prophet (peace and blessings of Allāh be upon him) ordered such a hole to be dug for a woman from Ghāmid.

The corpse of person executed by lapidation for adultery is entitled to the usual ablutions, and to all other funeral ceremonies. The Holy Prophet

(peace and blessings of Allāh be upon him) also allowed the funeral prayers to the woman from Ghāmid, after *Rajm*.

SODOMY OR UNNATURAL CRIME (*Liwāḥah*)

In respect of sodomy the Holy *Qur'ān* says :

وَلَوْ طَا إِذْ قَالَ لِقَوْمِهِ أَتَأْتُونَ الْفَاحِشَةَ مَا نَبَّيْكُمْ بِهَا مِنْ
أَحَدٍ مِّنَ الْعَالَمِينَ ۝ إِنَّكُمْ لَتَأْتُونَ الرِّجَالَ شَهْوَةً مِّنْ دُونِ
النِّسَاءِ ۖ بَلْ أَنْتُمْ قَوْمٌ مُّشْرِفُونَ ۝

“And We sent Lūṭ as a Messenger : Remember that he said to his people, “Have you become so shameless that you commit such indecent acts as no one committed before you in the world ? You gratify your lust with men instead of women : indeed you are a people who are transgressors of all limits.” (7 : 80, 81)

Here and at other places the Holy *Qur'ān* merely declares that sodomy is such a heinous sin that it brought the wrath of Allāh on a people. The Holy *Qur'ān* says :

أَتَأْتُونَ الذُّكْرَانَ مِّنَ الْعَالَمِينَ ۖ وَتَذَرُونَ مَا خَلَقَ لَكُمْ
رَبُّكُمْ مِنْ أَزْوَاجِكُمْ ۖ بَلْ أَنْتُمْ قَوْمٌ عَادُونَ ۝

“Of all the creatures in the world, will ye

approach males, "And leave those whom Allāh has created for you to be your mates ? Nay, ye are a people transgressing (all limits) !"

(26 : 165, 166)

وَلَوْ طَا إِذْ قَالَ لِقَوْمِهِ أَتَأْتُونَ الْفَاحِشَةَ وَأَنْتُمْ تُبْصِرُونَ ۝

أَنْتُمْ لَشَاتُونَ الرِّجَالَ شَهْوَةً مِنْ دُونِ الْنِسَاءِ ۖ بَلْ أَنْتُمْ

قَوْمٌ تَجْهَلُونَ ۝

"(We also sent) Lūt (as an Apostle) : behold, he said to his people, "Do ye do what is shameful though ye see (its iniquity) ? Would ye really approach men in your lusts rather than women ? Nay, ye are a people (grossly) ignorant !" (27 : 54, 55)

In the above verses mention has been made of that heinous crime which brought about the scourge of Allāh on the people who were committing it.

In regard to this there are traditions of the Holy Prophet (peace and blessings of Allāh be upon him) :

Abū Huraira reported that the Messenger of Allāh (peace and blessings of Allāh be upon him) said : "Verily he who comes unto his wife by her back, Allāh will not look at him." (*Sharh Sunna*)

Abū Huraira reported that the Messenger of Allāh (peace and blessings of Allāh be upon him)

said : Cursed is he who goes unto his wife by her back. (*Aḥmad, Abū Dāwūd*)

Ibn 'Abbās reported that the Messenger of Allāh (peace and blessings of Allāh be upon him) said : The Almighty and Glorious Allāh will not look at a man who comes to a man (with lust) or to a woman from her back. (*Tirmidhi*)

Jābir reported that the Messenger of Allāh (peace and blessings of Allāh be upon him) said : Verily the most fearful of what I fear over my people is the action of the people of Lūt. (*Tirmidhi, Ibn Majāh*)

Although wicked people have always been committing this most heinous sin that has given the people of Sodom an everlasting notoriety, yet it has always been considered a filthy and detestable act. But the only people who have ever tried to raise it to a moral excellence, were the Greek Philosophers in the ancient world, and the Europeans in the modern world. The latter are doing their utmost to make up the deficiency by making an open propaganda for it, and have succeeded in giving this filthy act a legal sanction. So much so that the legislatures of some countries have legalized it. It does not require any elaborate argument to show that homo-sexuality is a horrible social crime and a heinous sin. For the Creator has made the male and the female of each and every living species different from and complementary to each other for their reproduction. Then this difference in the human

species has been created to serve another purpose. This is to urge the two to live together in order to form a family along with their offsprings. For this is the foundation of a civilized life for which man has been created. That is why their bodies have been made complementary to attract each other for the satisfaction of sex urges and for the service of the natural function of reproduction of the species. Therefore, the one who satisfies this sex urge in an unnatural way becomes guilty of many crimes at one and the same time. (1) Such a one, so to speak, wages a war against the natural and physical functionings of his own organs and those victims of his lust. This inevitably produces very harmful effects on their physiques, their minds and their morality. (2) He becomes guilty of treachery and dishonesty against Nature for he enjoys sexual pleasure, without performing the necessary service of his species and civilization and without fulfilling the rights and obligations attached to it. (3) He commits a breach of trust against the society in general for he enjoys all the benefits of the civilized society, but in turn does not take on himself the responsibilities of the married life and wastes all his powers in the unnatural gratification of his sexual desires. This selfish and unworthy attitude is not only useless but also positively harmful to the collective morality. Thus he makes himself unfit for the service of the family and of the human race and produces unnatural feminine characteristics in, at least, one other male and opens the way to

adultery and moral degradation for at least two women.

Punishment

The Holy *Qur'ān* merely declares that sodomy is such a heinous sin that it brought the wrath of Allāh on a people. Then we learn from the guidance of the Holy Prophet (peace and blessings of Allāh be upon him) that it is the duty of the Islamic State to eradicate this crime and should punish those who are guilty of it.

If a man commits any act of sodomy he is to be corrected by *Ta'zir*, since such acts are illegal and forbidden by the Word of Allāh but a stated punishment is not appointed for them. *Ta'zir* must, therefore, be inflicted upon that person. If a man copulates with a man i.e., commits the act of sodomy, there is no stated punishment for him, according to Imām Abū Hanifa but he is to be corrected by *Ta'zir*. According to Imām Shāfi'i this act resembles adultery, the person committing it is subject to the stated punishment for adultery i.e., both the parties should be put to death, of whatever description they may be—that is, whether they be married or not. Here we quote a tradition of the Holy Prophet (peace and blessings of Allāh be upon him) to this effect :

عَنْ عِكْرَمَةَ عَنِ ابْنِ عَبَّاسٍ قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ
مَنْ وَجَدَ تَمْرَهُ يَغْتَلُّ يَغْتَلِّ عَمَلُ قَوْمٍ لَوْ طِ فَاقْتُلُوا الْفَاعِلَ وَالْمَفْعُولَ بِهِ

‘Akramah from Ibn ‘Abbās reported that the Messenger of Allāh (peace and blessings of Allāh be upon him) said : Whomsoever you find doing the deed of the people of Lūt, kill the doer and one on whom it is done. (*Tirmidhi, Ibn Majah*)

Imām Abū Hanifa, on the other hand, argues that his conjunction is not actual whoredom, because the Companions of the Prophet (peace and blessings of Allāh be upon him) have disagreed concerning their decrees upon it, for some of them have said that offenders of this kind should be burnt, some, that they should be buried alive, others, that they should be cast headlong from some high place, such as the top of a house, and then be stoned to death—and so forth ; moreover, the conjunction in question has not the property of whoredom as it is not the means of producing, offspring so as (like whoredom) to occasion any default in birth or confusion in geneology ; besides, this species of carnal intercourse is of less frequent occurrence than whoredom, because the desire for it exists only on the part of the active and not of the passive, whereas in whoredom the desire exists equally on both sides. As to the tradition cited by Shāfi‘i it probably relates to a case where an extraordinary and exemplary punishment is requisite, or where the perpetrator inculcates and insists upon the lawfulness of the act. However no definite and specific punishment was prescribed for the criminals because during his time, no case of sodomy was ever brought

before the Holy Prophet (peace and blessings of Allāh be upon him).

There are, however, some traditions from his successors regarding this. Hadrat 'Ali (Allāh be pleased with him) is of the opinion that criminals should be killed with sword and the dead bodies should not be buried but burnt to ashes. Hadrat Abū Bakr (Allāh be pleased with him) also agrees with it.

Ibn 'Abbās and Abū Huraira reported that the Messenger of Allāh (peace and blessings of Allāh be upon him) said : Cursed is he who commits the action of the people of Lūt. Razin narrated it. In a narration from Ibn 'Abbās by him : 'Ali burnt them both and Abū Bakr threw a wall upon them.

(*Mishkāt*)

Hadrat 'Umar and Hadrat 'Uthmān (Allāh be pleased with them) are of the opinion that they should be taken under the roof of a dilapidated building, which should be pulled down on them. Ibn 'Abbās has decreed that they should be thrown down headlong from the top of the highest building of the habitation and then stoned to death. According to Shī'ibi, Zuhri, Mālik and Aḥmad they should be stoned to death. Sa'id bin Musayyib, 'Atā Hasan Baṣri, Ibrāhīm Nakh'i, Sufyān Thauri and Auzā'i are of the opinion that the punishment is the same as for adultery, that is, one hundred stripes and exile for the unmarried, and stoning to death for the married. Imām Abū Hanifa is

of the opinion that the culprit should be punished in accordance with the circumstances of the crime with an exemplary punishment. There is also a saying of Imām Shāfi'i to this effect.

It should also be noted that it is unlawful for the husband to commit sodomy with his own wife. The Holy Prophet (peace and blessings of Allāh be upon him) has declared, "The man who commits such an act with a woman is accursed" and "Allāh will not even look at a person who commits this offence with a woman." In another tradition, he has warned, "The one who cohabits with a woman in her menses or commits sodomy with her or goes to a soothsayer and believes him to be true, is a disbeliever in what has been sent down to Muhammad."

CHAPTER 5

FORNICATION (ZINĀ)

Fornication is morally the most heinous crime that a person can commit. The one who commits it, in fact, proves that his humanity has been overwhelmed by his animality and he is not fit to live as a virtuous member of the society. From the social point of view it is one of those heinous crimes which cut the very root of human civilization. Therefore, Islam has held fornication as a punishable offence for its own sake, whether it is accompanied by some other offence as the use of violence or encroachment upon somebody else's legal rights or not.

Fornication in its strict signification implies illicit sexual relation between two unmarried persons.

Punishment

The punishment for fornication is one hundred stripes. The Holy Qur'ān says :

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ

وَالْيَوْمِ الْآخِرِ وَلَيَشْهَدُ عَذَابُهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ ۝

“The fornicators shall each be given a hundred stripes, and let not compassion move you in their case, in a matter prescribed by Allāh, if ye believe in Allāh and the Last Day : And let a party of the believers witness their punishment.” (24 : 2)

If the person convicted of fornication be a slave, male or female, the punishment of such is fifty stripes because the Holy *Qur'ān* says :

فَإِذَا أَحْصَيْنَ فَإِنْ أَتَيْنَ بِفَاحِشَةٍ فَعَلَيْهِنَّ نِصْفُ مَا عَلَى الْمُحْصَنَاتِ

“And if when they (the slave girls) are honourably married, they are guilty of indecency, they shall incur the half of the punishment (prescribed) for free woman (in that case).”

(4 : 25)

The lighter punishment for an adulterous slave girl than for a free Muslim woman, is based on the fact that the latter enjoys double protection as compared with the former—the protection of the family (even though she be married). In contrast to a free woman, a slave girl does not enjoy any protection at all, if she is unmarried, and even her marriage does not make her position equal to that of an unmarried free Muslim woman, for the latter enjoys the protection of her status, her family, her clan etc. On the other hand, a slave girl still remains, to some extent, under the bondage of slavery and has no protection of the family, clan

etc. Therefore, her punishment should be half of an un-married free woman.

Mode of Evidence

The sin of fornication must be established, as in the case of adultery, either by proofs or by confession.

To establish it by proof, four witnesses are required.

When a person for conscience sake confesses the sin of fornication, the confession must be repeated four times at four different appearances before the Qāḍi, and the person confessing must be very exact and particular as to the circumstances, so that there can be no mistake. A self-accused person may also retract the confession at any time before, or during, the infliction of punishment, and the retraction must be accepted.

Mode of Execution

How and in what manner the punishment of flogging is to be awarded has been made clear in Islam. We give below some of its details :

1. The punishment must be administered with a stick which has no knots upon it ; and that the stripes must be applied in moderation, that is to say, neither with severity nor yet with too much leniency. Haḍrat 'Alī (Allāh be pleased with him), when he was about to inflict punishment, used to

smooth off from the rod any knots which might happen to be upon it and as too much severity on the one hand tends to destruction, on the other hand too much leniency is inadequate to the design of punishment. The stripe or the flog should therefore, neither be too heavy or hard nor too weak or delicate. It should be just average both in weight and roughness. And when punishment is to be inflicted on any person, it is necessary that he be striped naked ; that is to say, that all the clothes be taken off, except the girdle because the punishment in this way administered with the greatest effect.

2. It is requisite that the hundred stripes be given not all upon the same part or member (limb) of the person upon whom punishment is inflicted, but upon different parts, as it might otherwise be attended with danger to life ; and none of the stripes must be inflicted on the face, the head or the privities. The Holy Prophet (peace and blessings of Allāh be upon him) once said to the executioner, "In inflicting the punishment, take care not to strike the FACE, the HEAD, or the PRIVITIES."

3. The man should be made to stand while flogging and the woman should be made to sit. In case of woman the clothes are

to be tied around her so that no part of her body is exposed.

The punishment for fornication is the same with respect to both sexes. The woman is not to be stripped, neither is her veil to be taken off, but only her robe, or other outward garment, as the removal of any other part of her dress would be repugnant to decency; but as the robe or outward garment would prevent the effect of the punishment and the removal of such is not indecent, she is to be stripped of these.

4. The Qur'ān uses the word *Jald* for flogging which is derived from *Jild* (the skin). The jurists have, therefore, stated that flogging should be such as does not inflict wounds on the body beneath the skin.
5. The executioner should strike neither with full force nor so lightly as not to do any harm to the offender.
6. The flogging should be avoided at the times of intense heat or extreme cold. One should be flogged in the sunshine during the winter season and in shade during the hot hours of the summer season.
7. It is not proper to flog on bare back after having tied the offender to the stake.
8. It is permissible to distribute the flogging on some days keeping in view the physical

condition of the criminal, but it is preferable to award punishment at one time.

9. Flogging should not be done by a cruel executioner but by scholars who are well versed in Islamic Law so that they should award punishment according to the letter and spirit of the Law.

10. If the offender is sick and he is likely to recover, then the flogging should be postponed till his recovery, but if the Qāḍī finds his illness incurable, then a bunch of one hundred straw should be struck on his body and thus be relieved of the burden of the prescribed punishment.

11. The punishment to a woman is to be awarded when the baby in her lap is weaned.

CHAPTER 6

FALSE ACCUSATION (*QADHF*)

Qadhf, in its primitive sense, simply means accusation. By *qadhf*, in the language of the law, is understood to levy a charge of adultery against a married man or woman. The person so acting being termed the *Qādhif*, or slanderer and the man or woman so scandalized the *Maqdhūf*/*Maqdhūfa* or slandered.

The Holy *Qur'ān* makes special provision for the protection of honour. In the case of a chaste woman it is prescribed :

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ
ثَمَنِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ ۝

“But to those who accuse chaste women of adultery and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their evidence ever after; for such men are wicked transgressors.” (24 : 4)

The evil caused by calumny is similar to that caused by fornication itself. Accusing a lady of fornication not only damages her reputation but

also creates bad blood between the families. It renders parentage doubtful, spoils conjugal relations and ruins the mental peace of scores of other people also for years to come. Therefore, the Holy *Qur'ān* has enjoined severe punishment for this offence.

Cases which constitute Qadhf

If a person deny another's parentage : as if he were to say to him, "Thou art not the son of thy (reputed) father !" such person thereby incurs punishment for slander. This, however, is only where the mother of the person thus addressed is a married woman ; because such denial is a positive accusation with respect to the mother of that person, since the legitimacy of a child cannot be denied unless it be begotten in whoredom.

If one person, in the heat of anger, say to another, "Thou art not the son of such-a-one", and the person mentioned be his father and his descent be established as from him, in this case the person so speaking incurs punishment for slander.

If a man say to another, "Thou are not the son of such-a-one", and it should happen that the person so named is the grand-father of him who is thus addressed, the accuser does not incur punishment for slander, because his assertion is virtually true. And, if a man should declare another to be the son of one who is his grand-father, he does not incur punishment, because the child's child is metaphorically referred to the grand-father, and is called his child.

If a man call another "a son of a whore", and it should happen that the mother of him who is thus addressed is dead, and had been a married woman, in such a case, if he (the son) require punishment for slander to be inflicted upon the speaker, the same must be inflicted accordingly, because the accuser has slandered a married woman after her death. It is to be observed, however, that a right to demand punishment for slander, on behalf of a deceased person belongs only to one in whose parentage a flaw is created by the imputation, and this is either the parent or the child, because scandal attaches to the child of the accused, and hence the slander applies to the child in effect.

A slave is not permitted to demand punishment for slander upon his master, where the latter has slandered his mother, being a married woman; neither does it belong to a son to demand punishment for slander upon his father, where the latter has slandered his mother, being a married woman; because a master is not liable to any chastisement on account of his slave, nor a father on account of his son. But if the mother should have another son by another father, that son may demand punishment for slander to be inflicted, on behalf of his mother, upon the aforesaid father, because the occasion for punishment (namely slander) is in that case fully established, and the obstacle to the demand of it does not exist in the person who demands it.

If any person accuse another of whoredom, and the person so slandered die, punishment for slander is not incurred. And in the same manner, if the slandered person should die after the infliction of a part of the punishment upon the slanderer, the remaining part thereof ceases.

If one man should say to another "Thou art a whoremonger", and the other should answer "Nay, but thou", they both incur punishment for slander, as attempting each to fix an imputation of whoredom upon the other.

If a man should say to his wife "Thou adulteress !" and she should answer saying, "Nay ; but thou !" punishment for slander is incurred by the woman, and there is no *Li'ān* (imprecation)¹ in this case because the husband and wife are both equally accusers ; but the accusation advanced by a husband against his wife induces *Li'ān* and that by a wife against her husband induces punishment for slander ; and punishment for slander is here first inflicted upon the woman in order to prevent *Li'ān*, as a person who has suffered punishment for slander is incapable of making *Li'ān*.

If a man accuse of whoredom a woman who has children, the father of whom is unknown, or if he

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1. *Li'ān* or "imprecation" : That is when a husband charges his wife with adultery, the charge is investigated, but if there is no proof, and the man swears his wife is guilty, and the wife swears she is innocent, a divorce must be decreed.

should so accuse a woman who has made *Li'ān*, in consequence of any of her children having been denied (by her husband), whether such children be living or not, in neither of these cases is punishment for slander incurred because the signs of whoredom are found with the woman, namely, her children, who are without any acknowledged father. The reputation of this woman is, therefore, questionable, on account of these signs ; and perfect chastity of repute in the accused is one condition of punishment for slander being incurred by the accuser. But if a man were to accuse of whoredom a woman who has made *Li'ān* in consequence of an imputation of adultery made against her by her husband, and not on account of his denial of her children, in this case punishment for slander is to be inflicted upon the accuser, since here no signs of whoredom are found with the woman.

If a man have unlawful commerce with a woman in whom he has no right of cohabitation, punishment for slander is not to be inflicted upon this accuser, because chastity of repute is not applicable to the accused (and this is conditional to his being married, in the sense which induces punishment for slander upon the accuser), and also, because the accuser in this instance speaks truly.

If an infidel, residing under protection in an Islamic State should accuse a Muslim, punishment for slander is incurred by him, because, in punishment for slander, the rights of the individual are

concerned, and the protected infidel has undertaken to pay a due observance to the rights of individuals, since, as he himself desires to be screened from injury, it follows that he undertakes that he will not offer injury to others ; and also, that he subjects himself to the consequence, if he should do so.

Punishment

The punishment for calumny (*qadhif*) is eighty stripes provided the person slandered is a free man ; of sound judgement ; of mature age ; and is a Muslim ; and also of chaste repute. There are, therefore, five conditions required for punishment to the *Qādhif* (slanderer) :

1. The *Maqdhūf*/*Maqdhūfa* (slandered person) should be a free man or woman.
2. The slandered man or woman should be sane and of sound judgement.
3. The slandered man or woman should be of mature age because infants and idiots are not liable to be scandalized as whoredom cannot be proved upon such.
4. The slandered man or woman should be a Muslim because the Holy Prophet (peace and blessings of Allāh be upon him) declared, "A Polytheist is not a *Muḥṣan*."
5. Chastity, because no scandal attaches to any other persons than those who are of chaste repute, and the accuser of an unchaste person, moreover, speaks truly.

If the accused be a slave, the punishment for slander with respect to him is forty stripes ; as bondage induces only half the punishment.

If a person makes confession of *qadhif* and afterwards retracts from such confession, his retraction is not to be credited, because, as the right of the *Maqdhūf* is therein concerned, it is to be supposed that he will falsify the retraction ; contrary to such punishments as are purely a right of Allāh, where the retraction must be admitted, as there is no person concerned to oppose the veracity of it.

If punishment for *qadhif* be inflicted upon a Muslim ; his evidence cannot afterwards be received, although he should repent. However, Imām Shāfi'i differs and holds that in case of repentance, the credibility of his evidence is restored.

Mode of Evidence

The *Qādhif* is required to produce four witnesses in support of his allegation. In case he fails to do so, eighty stripes will be inflicted upon him debarring him to appear as a witness for ever.

Mode of Execution

It is necessary that the eighty stripes be inflicted on different parts (or limbs) of the offender, in conformity to what has already been advanced upon that subject with respect to the punishment for whoredom ; but it is to be observed that the person suffering this correction is not to be striped naked, because the occasion of the punishment is not absolutely certified,

since it is possible that the *Qādhif* may have spoken truly, for which reason it must not be inflicted with severity, as in punishment for whoredom. The outer garment or robe, however, together with any clothes, which are stuffed or quilted, must be removed, because such a covering would prevent a person from feeling his punishment.

If any person expressly accuse of whoredom a man or woman who is married (without producing the number of witnesses requisite to prove the charge), in such case, if the accused require the *Qādī* to pass sentence of punishment for *qadhif* upon that person, the *Qādī* is bound to order its infliction.

CHAPTER 7

APOSTASY (IRTIDĀD)

The Arabic equivalent for apostasy is *riddah* or *irtidād* from the root *radd* which, among other connotations, has the meaning "to retract, to retire, to withdraw from or fall back from." In the context of Islamic Jurisprudence it is equated with renunciation or abandonment of Islam by one who professes Islamic faith. The apostate is called *Murtadd*. According to Muslim jurists, apostasy may be committed with reference to belief, word or deed, or even by failure to observe certain obligatory practices. The person concerned must have attained majority, should be in full possession of his senses and should have acted voluntarily, if he is to be condemned as an apostate.

The famous scholar Qulyubi has defined apostasy as dis-association from Islam either with the intention of *atheism* (*kufr*) or with the words of *atheism* or with an act of *atheism*.

Apostasy in Islamic Law means turning from Islam after being a Muslim. Not only does it occur when a person declares his conversion to some non-

Islamic Religion, but also when he refuses to believe in any and every basic article of the Islamic faith.

The term apostasy (*irtidad*) has been used both in the Holy *Qur'ān* and the *Sunnah*. The Holy *Qur'ān* describes :

وَمَنْ يَرْتَدِدْ بِكُمْ عَنْ دِينِهِ قِيمَتٌ وَهُوَ كَافِرٌ فَأُولَٰئِكَ حَبِطَتْ
أَعْمَالُهُمْ فِي الدُّنْيَا وَالْآخِرَةِ ۖ وَأُولَٰئِكَ أَصْحَابُ النَّارِ هُمْ
فِيهَا خَالِدُونَ ۝

"And whosoever turns his back from his religion and dies as an unbeliever, it is they whose works would be vain in the world and the Hereafter, and they are the denizens of Hell-Fire, and therein shall they abide for ever."
(2 : 217)

Islam has looked down upon it as a very grave offence and has recommended capital punishment for it, the details of which can be found in the Holy *Qur'ān*, the *Sunnah* of the Holy Prophet (peace and blessings of Allāh be upon him) and the practice followed by his four righteous Caliphs. Again the Holy *Qur'ān* says :

قَانَ تَابُوا وَأَقَامُوا الصَّلَاةَ وَآتَوْا الزَّكَاةَ فَأَخْوَأْنَاكُمْ فِي الدِّينِ
وَنَسْفَعُ الْأَيْتِ لِقَوْمٍ يَعْلَمُونَ ۝ وَإِنْ نَكَشْتُمْ أَيْمَانَهُمْ مِنْ بَعْدِ

عَهْدِهِمْ وَطَعْنُوا فِي دِينِكُمْ فَقَاتِلُوا أئِمَّةَ الْكُفْرِ إِنَّهُمْ لَا أَيْمَانَ
لَهُمْ لَعَلَّهُمْ يَنْتَهُونَ ۝

"But if they repent and establish *Ṣalāt* and pay the *Zakāt*, then are they your brethren-in-religion. We detail Our revelations for a people who have knowledge. And if they break their pledges after their treaty (hath been made with you) and assail your religion, then fight the heads of disbelief. Lo! they have no binding oaths—in order that they may desist. (9 : 11, 12)

This verse states clearly how the renegades should be treated.

The sayings and doings of the Holy Prophet (peace and blessings of Allāh be upon him), the decision and practice of the Caliph Abū Bakr (Allāh be pleased with him), the consensus of the opinion of the Companions of the Holy Prophet (peace and blessings of Allāh be upon him) and all the later Muslim jurists, and even certain verses of the Holy *Qur'ān* all prescribe capital punishment for an apostate. In the case of apostasy, no distinction is made between a Muslim born of Muslim parents and a convert, and similarly there is no difference between accepting Judaism or Christianity, atheism or idol-worship or any other non-Islamic faith. Nevertheless, Muslim jurists emphasize that before prosecuting and condemning an apostate, it is necessary officially to discuss the matter with him and to remove his doubts regarding the soundness

and reasonableness of the Islamic point of view in the matter concerned. Time is given to him for reflection sometimes even for months before finally proceeding with the prosecution. There is also no difference between a free man and a slave in regard to punishment of apostasy.

The Holy Prophet (peace and blessings of Allāh be upon him) has said in unequivocal terms :

مَنْ بَدَّلَ دِينَهُ فَاتُّلُوهُ ۝

“He who substitutes his *Din*, (for another one) put him to death.”

The above tradition of the Holy Prophet (peace and blessings of Allāh be upon him) is reported by Ḥaḍrat Abū Bakr, Ḥaḍrat ‘Uthmān, Ḥaḍrat ‘Alī, Ḥaḍrat Mu‘ādh ibn Jabal, Ḥaḍrat Abū Mūsā al-Ash‘arī, Ḥaḍrat ‘Abdullah ibn ‘Abbās, Ḥaḍrat Khālīd ibn Walīd and other prominent Companions and is available in all authentic books of *Ḥaḍīth*.

As we find in the following *Aḥādīth*, punishment for apostasy is death :

حَدَّثَنَا عَبْدُ اللَّهِ بْنُ مَسْعُودٍ قَالَ : قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ

وَسَلَّمَ لَا يَجِلُّ دَمُ امْرِئٍ مُسْلِمٍ يَشْهَدَانِ لَا إِلَهَ إِلَّا اللَّهُ وَأَنِّي

رَسُولُ اللَّهِ إِلَّا يَأْخُذِي ذَلِكَ : النَّفْسُ بِالنَّفْسِ ، وَالْثِيَابُ بِالزَّانِي ،

وَالْمَقَارِقُ بِدِينِهِ وَالتَّارِكُ لِلْجَمَاعَةِ

“Abdullah b. Mas‘ūd (Allāh be pleased with him) reported Allāh’s Messenger (peace and blessings of Allāh be upon him) as saying : It is not permissible to take the life of a Muslim who bears testimony to the fact that there is no god but Allāh and I am the Messenger of Allāh, but one of the three cases : a life for life, the married adulterer, and deserter of his *Dīn* (Islam), abandoning the Community.”

(*Bukhārī, Mūslim, Abū Dāwūd*)

عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا قَالَتْ : أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ

وَسَلَّمَ قَالَ لَا يَحِلُّ دَمُ امْرِئٍ مُسْلِمٍ إِلَّا رَجُلٌ زَنَى بَعْدَ إِحْصَائِهِ

أَوْ كَفَرَ بَعْدَ إِسْلَامِهِ أَوِ اتَّخَذَ النَّفْسَ بِالنَّفْسِ

“Ḥaḍrat ‘A’isha (Allāh be pleased with her) reported Allāh’s Messenger (peace and blessings of Allāh be upon him) as saying : It is not lawful to shed the blood of a Muslim except where a married person commits adultery, a person who apostatises after accepting Islam or one who kills a person.”

(*Nasā’ī*)

عَنْ عُثْمَانَ رَضِيَ اللَّهُ عَنْهُ قَالَ : سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ

عَلَيْهِ وَسَلَّمَ يَقُولُ : لَا يَحِلُّ دَمُ امْرِئٍ مُسْلِمٍ إِلَّا بِأَحَدٍ ثَلَاثٍ

رَجُلٍ كَفَرَ بَعْدَ إِسْلَامِهِ أَوْ زَنَى بَعْدَ إِحْصَانِهِ أَوْ قَتَلَ نَفْسًا
بَغْيٍ نَفْسٍ

“Ḥaḍrat ‘Uthmān (Allāh be pleased with him) reported : I heard the Messenger of Allāh (peace and blessings of Allāh be upon him) as saying : It is not lawful to shed the blood of a Muslim except in one out of three cases : a person who apostatises after accepting Islam or who fornicates after marriage or who kills a person without retaliation for murder of another.”

(Nasā’i)

عَنْ عُثْمَانَ رَضِيَ اللَّهُ عَنْهُ قَالَ : سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ
عَلَيْهِ وَسَلَّمَ يَقُولُ : لَا يَحِلُّ دَمُ اسْرِئِ مُسْلِمٍ إِلَّا بِأَحَدٍ ثَلَاثٍ
رَجُلٍ زَنَى بَعْدَ إِحْصَانِهِ فَعَلَيْهِ الرَّجْمُ أَوْ قَتَلَ عَمْدًا فَعَلَيْهِ الْقِصَاصُ
وَأَرْتَدَّ بَعْدَ إِسْلَامِهِ فَعَلَيْهِ الْقَتْلُ -

“Ḥaḍrat ‘Uthmān (Allāh be pleased with him) reported Allāh’s Messenger (peace and blessings of Allāh be upon him) as saying : It is not lawful to shed the blood of a Muslim except for three crimes : Firstly, who fornicates after marriage, punishment for which is stoning to death (*Rajm*), secondly, who deliberately kills a person, for which *Qisās* is applicable, thirdly, a

person who apostatisises after accepting Islam, his punishment is death.” (Nasā’i)

Ḥadīrat Abū Mūsā al-Ash‘ari reported :

أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ بَعَثَهُ إِلَى الْيَمَنِ ثُمَّ أَرْسَلَ مَعَاذَ بْنَ جَبَلٍ بَعْدَ ذَلِكَ فَلَمَّا قَدِمَ قَالَ أَيُّهَا النَّاسُ إِنِّي رَسُولُ رَسُولِ اللَّهِ إِلَيْكُمْ قَالَتِي لَهُ أَبُو مُوسَى وَسَادَةٌ لِيَجْلِسَ عَلَيْهَا فَأَتَى رَجُلٌ كَانَ يَهُودِيًّا فَاسْتَلَمَ ثُمَّ كَفَرَ فَقَالَ مَعَاذُ لَا أَجْلِسُ حَتَّى يُقْتَلَ قَضَا وَ اللَّهُ وَرَسُولُهُ ثَلَاثَ مَرَّاتٍ فَلَمَّا قُتِلَ قَعَدَ

“The Holy Prophet (peace and blessings of Allāh be upon him) sent him (Abū Mūsā al-Ash‘ari) to Yemen as his Governor and, soon after, Mu‘ādh b. Jabal was also deputed to go there as his assistant. When Mu‘ādh reached there, he declared : O’ people I have been sent to you by the Messenger of Allāh (peace and blessings of Allāh be upon him). Abū Mūsā welcomed him and invited him to sit down. At that time a Jew had been brought there, under arrest, who had at first become a Muslim but had later reverted to Judaism. Mu‘ādh declined to sit down unless the apostate Jew was first killed, in accordance with the Judgement of Allāh and his Messenger. Mu‘ādh repeated this thrice.

When his behest was complied with and the Jew was put to death, Mu'adh sat down."

(Bukhārī, Bab "*Hukm al-Murtadd wa'l Murtaddat wa Istifabathum*)

Ḥaḍrat Sa'd ibn Abi Waqqās narrated :

لَمَّا كَانَ يَوْمَ فَتْحِ مَكَّةَ اخْتَبَا عَبْدُ اللَّهِ ابْنَ سَعْدِ بْنِ أَبِي سَرَحٍ عِنْدَ
عُثْمَانَ بْنِ عَفَّانٍ فَبَجَاءَ بِهِ حَتَّى أَوْقَفَهُ عَلَى النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ
وَسَلَّمَ فَقَالَ يَا رَسُولَ اللَّهِ بَايَعِ عَبْدُ اللَّهِ فَرَفَعَ رَأْسَهُ فَنَظَرَ إِلَيْهِ
ثَلَاثًا كُلَّ ذَلِكَ يَأْتِي فَبَايَعَهُ بَعْدَ ثَلَاثِ ثُمَّ أَقْبَلَ عَلَى أَصْحَابِهِ فَقَالَ
أَمَّا فِيكُمْ رَجُلٌ رَشِيدٌ يَقُومُ إِلَى هَذَا حِينَ زَانِي كَفَفْتُ يَدَيَّ عَنْ
يَعْتِهِ فَيَقْتُلُهُ فَقَالُوا مَا نَذَرِي يَا رَسُولَ اللَّهِ مَا فِي نَفْسِكَ إِلَّا
أَوْسَانُ إِلَيْنَا بِعَيْنِكَ قَالَ إِنَّهُ لَا يَنْبَغِي النَّبِيَّ أَنْ تَكُونُ لَهُ
خَائِنَةٌ الْأَعْيُنُ

"When Mecca was conquered 'Abdullah ibn Abi Sarah took shelter with Ḥaḍrat 'Uthmān (Allāh be pleased with him), who took him to the Holy Prophet (peace and blessings of Allāh be upon him) and requested the Prophet three times repeatedly to accept his allegiance. The Holy Prophet (peace and blessings of Allāh be upon him) looked at him but kept quiet. It occurred

three times. After this the Holy Prophet (peace and blessings of Allāh be upon him) acceded to the request and accepted his allegiance. Later he turned to his Companions and said : Was there no rightly-guided person among you who could have risen to kill this man, seeing that I was withholding my hand from allegiance ? The Companions said that they could not know what was in the mind of the Prophet (peace and blessings of Allāh be upon him) unless he had himself given them an indication by a wink of his eye. The Prophet (peace and blessings of Allāh be upon him) told them that it was not becoming of a Prophet to have made such a stealthy sign with his eye." (Abū Dāwūd)

It was at his explicit order that 'Abdullāh b. Sa'd b. ibn Sarāḥ, Maqis b. Sabāha, Hilāl b. Khaṭṭal were killed on the occasion of the conquest of Mecca, for the crime of apostasy.

Hadrat 'Ā'isha (Allāh be pleased with her) reported :

إِنَّ امْرَأَةً ارْتَدَّتْ يَوْمَ أُحُدٍ فَامَرَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ بِأَنْ
تُسْتَأْبَ فَإِنْ تَابَتْ وَإِلَّا قُتِلَتْ

"On the occasion of Battle of Uḥud (when Muslims had to retreat) a woman became apostate. On this the Holy Prophet (peace and blessings of Allāh be upon him) said : Ask her to repent and if she does not repent, kill her." (Baiḥaqī)

of Islam, he declines to follow it, they should smite his neck. (*Kanz al-'Ummāl*)

Two facts emerge out prominently in connection with the problem of *Irtidād* :

- (a) As soon as the man makes profession of Islam, even though to save his life, his safety is guaranteed.
- (b) The severe punishment is recommended for one who abandons the faith of Allāh, as he turns his back to all that is good and noble and accepts evil instead. He in fact loses the citizenship of Islamic Society and nationality of the *Millat* of Islam and joins the forces of *Kufr*.

The opinions of the jurists differ whether a child abandoning his faith in childhood should be treated as an apostate or not. The Imām Abū Ḥanifa and the Imām Aḥmad treat him so, but the Imām al-Shāfi'ī holds the opposite view. They all, however, agree on the point that the punishment should be given after he has attained the age of maturity.

Secondly, the man who has not wits about him cannot be treated as an apostate, since a man who is not in his senses is immune from the application of the Islamic Law. Thus a man who declares himself apostate in a state of madness would not be punished at all. It is on the basis of this principle that the Imām Abū Ḥanifa does not treat those persons as apostate who are under the influence of intoxication. *Thirdly*, the man who declares himself

Ḥaḍrat Jābir ibn 'Abdullah reported :

إِنَّ امْرَأَةً أُمِّ رُوْمَانَ ارْتَدَّتْ قَامَرَ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَأْنٍ يُعْرَضُ عَلَيْهَا الْإِسْلَامُ فَإِنْ تَابَتْ وَإِلَّا قُتِلَتْ

"A woman named Umm Rūmān committed apostasy. The Holy Prophet (peace and blessings of Allāh be upon him) ordered : She may be presented Islam. Then if she repents, it would be better, otherwise she should be put to death." (*Dāraqutnī and Baihaqī*)

The first Caliph Ḥaḍrat Abū Bakr (Allāh be pleased with him) fought against the apostates (*Murtaddīn*) and made their blood permissible. We find instances of this punishment during the reign of subsequent Caliphs.

'Amr b. al-'Āṣ, the Governor of Egypt, wrote to Ḥaḍrat 'Umar (Allāh be pleased with him), the Second Caliph, that a person had accepted Islam but had reverted to disbelief. He again came back to the Islamic fold but became a renegade a second time. He had been oscillating between the two faiths a number of times and now finally wanted to rejoin the Muslim community. The Governor asked for advice as to what should be done in such a case. Ḥaḍrat 'Umar (Allāh be pleased with him) replied that his Islam "should be accepted as long as Allāh accepts it"—so long as he goes on repenting, his profession should be accepted as valid. It was added by the Caliph in his reply that if, after presentation

apostate not by his own will, but under the pressure of enemies of Islam should not be killed. The jurists however differ on the point whether he should be treated as a Muslim or non-Muslim by the Islamic Society. Imām Abū Hanifa and Imām Shāfi'i are of the opinion that he should receive the same treatment from Muslim Society as a follower of Islam. Imām Ahmad, however, is of the view that such a person should not be killed but at the same time he should not be treated as a Muslim. His case must be left to Allāh.

The apostate has to choose between Islam and the sword ; he cannot be given protection (جوار), nor will he be allowed to become a *Dhimmi*. An apostate is *de jure* dead. So if he does not embrace Islam, and escape to some non-Muslim territory, his property in the Islamic territory will be distributed among his Muslim heirs as if he were dead.

Distinction between the Territory of Apostates and the Territory of ordinary non-Muslims

Al-Māwardī writes that there are five characteristics in the territory of apostates (دار الردة) which distinguish it from the territory of ordinary non-Muslim (دار الكفر), namely :

1. A treaty of peace or alliance is not ordinarily allowed with the apostates ; no such restriction exists in relation to ordinary non-Muslim foreigners.
2. An apostate is not allowed to become a *Dhimmi*.

3. An apostate has nothing to choose but the re-embracing of Islam or the sword, he cannot be enslaved and so let alive.
4. The booty acquired from an apostate is not to be distributed among the capturing troop ; it will go to *Bait al-Māl*. Property of dead apostates, captured during a conflict, at once becomes the property of the Muslim State ; but if living, his property is to be held in trust to be returned to him on re-embracing Islam or finally to be confiscated at his death.
5. Apostates made prisoners, if they do not re-embrace Islam, will in due course be beheaded—no protection may be given to them as in the case regarding ordinary belligerent prisoners.

There are also certain similarities between the treatment of apostates and that of non-Muslim belligerents. So an apostate is not held responsible for the destruction of Muslim life and property during the war, upon his return to Islam. This was actually decided in the time of the first Caliph Ḥaḍrat Abū Bakr (Allāh be pleased with him), and of course his precedent could not be contested. Further in being fought and pursued, the apostates are just like other non-Muslim enemy combatants. Their ambassadors too, will receive the same rights and immunities. So, during the life of the Holy Prophet (peace and blessings of Allāh be upon him), the ambassadors of Musailimah, the Impostor, came to Medina ; and on

being asked, replied that they too held the notions of him who sent them. At this the Holy Prophet (peace and blessings of Allāh be upon him) said :

“But for the fact that ambassadors cannot be killed, by God, I would have ordered you both to be beheaded.”¹

Further, an apostate cannot inherit from his Muslim relatives.

There has been a good deal of criticism against the severe punishment which Islam prescribes for apostasy. The main line of argument is that acceptance and abandonment of religion is a matter of one's own choice and should not therefore, be made a cognizable offence. This whole argument is based on one wrong supposition and that is the reason why the punishment prescribed by Islam for apostasy seems to be tyrannical. If Islam were a mere religion in the sense in which this term is commonly used, a hotch-potch of dogmas and rituals, having no direct relation with the economic, political and social structure of society, then such severe punishment for apostasy would have certainly been the height of high-handedness because the change of religion would not have, in the least, disturbed the social order. But the problem is that in Islam the Kingdom of Heaven whose foundations are firstly laid in the heart of man is to be essentially externalised in every phase of social set up, i.e., in politics, in economics, in law, in manners and in international

1. Ibn Hishām, p. 965

relations. In such circumstances it is quite obvious that when a person rebels against the Kingdom of Heaven within his heart, he commits high treason against the Kingdom of Heaven on earth, the visible and concrete expression of the Kingdom of Heaven within the heart. The persons who commit treason are always dealt with severely in every political order. A stern attitude is always adopted by all sane governments against rebels and disruptionists, and so is the case with Islam. There is nothing unusual about what Islam has done. In Islam religion is not a matter of private relationship between man and Allāh, but is intertwined with society. So when he abandons Islam he in fact revolts against the authority of the Islamic State and society.

Punishment

Apostasy in Islam implies deliberate abandonment of Islam. There is almost consensus of opinion among the jurists that apostasy from Islam (*Irtidād*) must be punished with death.

According to Islamic Law, a male apostate, or *Murtadd* is liable to be put to death if he continue obstinate in his error; a female apostate is not subject to capital punishment, but she may be kept in confinement till she recant.¹

The Hanafites are inclined to think that the punishment of apostasy is applicable to men. According to them, women are only to be kept in prison

1. Hamilton, *Hidaya*, Vol. II, p. 227.

until they repent, because the Holy Prophet (peace and blessings of Allāh be upon him) has forbidden the putting to death of unbelieving women. Those who differ with this view assert that this has reference only to the killing of the unbelieving women in war and not to the apostate women.

In case an insane person¹, a delirious, a melancholy and perplexed man², one intoxicated³, a minor⁴, one who had declared his faith in Islam under coercion⁵, and a person whose faith in Islam has not been known or established⁶ were to become apostate they would not suffer the supreme penalty.

Mode of Evidence

There is a consensus of opinion amongst the Muslim jurists that we should have clear evidence of the apostasy of a man. There should be no ambiguity about it. Imām Abū Hanīfa and Imām Aḥmad are of the view that an apostate should be afforded every opportunity to explain his views and his own interpretation of his contention should be accepted as valid and if he denies the charge of apostasy, he should not be punished at all.

The apostate is not immediately put to death but is given a fair chance to explain his viewpoint

1. Kaisānī, *Badā'i*, Vol. VII, p. 134.

2. *Ibid.*

3. *Ibid.*

4. *Ibid.*

5. Sarakhsī, *Mabsūṭ*, Vol. X, p. 123.

6. Ibn 'Ābidīn, *Radd-ul-Mukhtār*, Vol. III, pp. 326, 327.

and every effort is made to convince him of the foolishness of this act of his and bring him to repentance.

The jurists are also of the opinion that no one is to be treated as an apostate unless he is mature of age, and has his wits about him and is not under any subjection or external pressure.

Mode of Execution

According to the Islamic Law, a male apostate or *Murtadd* is killed with the sword. 'Ikrima reported that some apostates were brought to the Caliph 'Ali (Allāh be pleased with him), and he burnt them alive. When Ibn 'Abbās heard of it he said, that the Caliph had not acted rightly, for the Holy Prophet (peace and blessings of Allāh be upon him) had said "Punish not with Allāh's punishment (i.e., fire), but whosoever changes his religion, kill him with the sword." (*Bukhārī*)

A female apostate is not subject to capital punishment, but she may be kept in imprisonment until she repent.

CHAPTER 8

DRINKING WINE (*KHAMR*)

The drink prohibited in Islam is described as *Khamr*. *Khamara* originally means "it veiled or covered or concealed" a thing and wine is called *khamr* because it veils the intellect and obscures the moral sensibilities of a man. *Khamr* is differently explained as meaning what intoxicates, of the expressed juice of grapes, or the juice of grapes when it has effervesced and thrown up froth, and become freed therefrom, and still, or it has a common application to intoxicating expressed juice of anything, or any intoxicating thing that clouds or obscures the intellect.¹

It has been established now that the basic material in alcoholic fermentation is the same (i.e., glucose) whichever raw material is used. Grape juice contains ready glucose, but in the case of corn, glucose has to be produced by various treatments, before alcoholic fermentation can even start. So *khamr* covers all alcoholic beverages, a view held by Shah Waliullah and almost all the Imāms.

1. Lane, *Lexicon*.

Wine under the term *Khamr* (خمر), which is generally held to imply all things which intoxicate, is forbidden in the Holy *Qur'ān* in the following verses :

يَسْأَلُونَكَ عَنِ الْخَمْرِ وَالْمَيْسِرِ قُلْ فِيهِمَا إِثْمٌ كَبِيرٌ وَمَنَافِعُ
لِلنَّاسِ وَإِثْمُهُمَا أَكْبَرُ مِنْ نَّفْعِهِمَا ط

“They will ask thee concerning wine and the game of chance. Say : In both there is a great sin, and some benefits for men ; but their sin is greater than their benefits.” (2 : 219)

Again the Holy *Qur'ān* says :

يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنصَابُ وَالْأَزْلَامُ
رِجْسٌ مِّنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ ه إِنَّمَّا
يُرِيدُ الشَّيْطَانُ أَنْ يُوقِعَ بَيْنَكُمُ الْعَدَاوَةَ وَالْبَغْضَاءَ فِي الْخَمْرِ
وَالْمَيْسِرِ وَيَصُدَّكُمْ عَنْ ذِكْرِ اللَّهِ وَعَنِ الصَّلَاةِ قُلْ أَنتُمْ
مُنْتَهُونَ ه

“O Believers ! surely wine and games of chance, (ungodly) shrines, and divining devices, are an abomination of Satan's work ! Avoid them, that ye may prosper. Only would Satan sow hatred and strife among you, by wine, and games of chance, and turn you aside from the remem-

berance of Allāh, and from Prayer. Will you not, therefore, abstain from them ? (5 : 90, 91)

At first a mere disapproval of these things was pronounced to serve as a preliminary to their final prohibition. The next step in this direction was that the Muslims were prohibited from offering Prayers when they were drunk. Finally, drinking, gambling and the like were all made absolutely unlawful.

Before this last Commandment was given, the Holy Prophet (peace and blessings of Allāh be upon him) addressed the people in order to prepare them for its absolute prohibition. He warned the people and said, "Allāh does not like at all that people should drink wine. Probably absolute prohibition will soon be prescribed : therefore those who possess wine are advised to sell it." Some time after this when the above verse was sent down he declared, "Now those who possess wine, can neither drink it nor sell it. They should, therefore, throw it away." Accordingly it was spilt in the streets of Medina to run wastefully. Some people, however, asked the Holy Prophet (peace and blessings of Allāh be upon him), "May we give it as a present to the Jews ?" He replied, "The One who has made it unlawful has also forbidden to give it as a present." Others asked, "May we convert it into vinegar ?" He replied, "No, you must spill it." Another asked again and again, "Is one permitted to use wine as medicine ?" The Holy Prophet (peace and blessings

of Allāh be upon him) emphatically rejected this also and said, "No, it is not a medicine but a disease." Yet another asked, "O' Apostle of Allāh ! we live in a place, which is very cold, and we have to do tiresome labour. So we drink wine to refresh ourselves from fatigue and to keep warm in the cold." He said, "Is what you drink intoxicant ?" The man replied, "Yes." The Holy Prophet (peace and blessings of Allāh be upon him) replied, "Refrain from it." At this the man said, "The people of our part of the country will not submit to this." He replied, "If they do not submit to this, then go to war against them."

Though originally the Arabic word "خمر" (*khamr*) meant only wine, it was also applied to the liquors made from wheat, barley, dried grapes, dates and honey. The Holy Prophet (peace and blessings of Allāh be upon him) applied the prohibition to all sorts of intoxicants, and there are Traditions that clearly support this. For instance, "Every intoxicant is wine and is unlawful"; "Every drink that inoxicates is unlawful"; "I prohibit every intoxicant." In one of his Friday Sermons, Caliph 'Umar (Allāh be pleased with him) defined *khamr* as everything that dulls the faculty of thinking.

In this connection, the Holy Prophet (peace and blessings of Allāh be upon him) laid down the general principle : if a large dose of something is intoxicant, then even its smallest dose is also unlawful, and if a cup of anything is intoxicant, then even a drop of it is also unlawful.

According to a Tradition reported by Ibn 'Umar, the Holy Prophet (peace and blessings of Allāh be upon him) declared, "Allāh has cursed wine and the one who drinks it and the one who serves it and the one who sells it and the one who buys it and the one who extracts it and the one who has it extracted and the one who carries it and the one for whom it is carried."

According to another Tradition the Holy Prophet (peace and blessings of Allāh be upon him) prohibited the Muslims from eating that food which is served along with wine. Even the use of those utensils which were employed for drinking was prohibited.

Punishment

During the time of the Holy Prophet (peace and blessings of Allāh be upon him), there was no fixed punishment for a drunkard. The accused, who was arrested and brought for trial, was beaten with shoes, kicked, given blows and thrashed with sticks and ropes. Forty stripes were the maximum punishment given for this crime.

Anas b. Mālik reported that a person who had drunk wine was brought to Allāh's Apostle (peace and blessings of Allāh be upon him). He gave him a beating with palm branches and sandals for drinking wine and that Abū Bakr (Allāh be pleased with him) gave forty lashes (*Bukhārī* and *Muslim*). In a version on his authority it says that the Holy Prophet (peace and blessings of Allāh be upon him)

used to give forty stripes with palm branches and sandals for drinking wine.

'Abd al-Rahmān b. al-Azhar said : I can still picture myself looking at Allāh's Messenger (peace and blessings of Allāh be upon him) when a man who had drunk wine was brought before him and he told the people to beat him. Some struck him with sandals, some with sticks and some with *mitakhas*. Ibn Wahb said : this means green palm fronds. Then Allāh's Messenger (peace and blessings of Allāh be upon him) took some dust from the ground and threw it on his face. (*Abū Dāwūd*)

Abū Huraira said : When a man who had drunk wine was brought to Allāh's Messenger (peace and blessings of Allāh be upon him) he told us to beat him, and some struck him with their hands, some with their garments and some with their sandals. (*Abū Dāwūd*)

Forty stripes were the maximum punishment for this crime during the Caliphate of Ḥaḍrat Abū Bakr (Allāh be pleased with him). But when he saw that the crime was on the increase, he in consultation with the other Companions, laid down eighty stripes for this.

Thaur b. Zaid ad-Dailamī told that Ḥaḍrat 'Umar (Allāh be pleased with him) sought counsel about the prescribed punishment for drinking wine and 'Alī (Allāh be pleased with him) said to him, "I think you should give one who drinks eighty lashes, for when he drinks he becomes intoxicated, when

he is intoxicated he raves, and when he raves he makes up lies." So Ḥaḍrat 'Umar (Allāh be pleased with him) inflicted eighty lashes as the punishment prescribed for drinking wine. (Mālik)

Shah Waliullah has given a very thought-provoking explanation for prescribing forty or eighty lashes for drinking. He says that the least one can expect from a drunkard is that he would talk nonsense and bring people into disrepute and sling mud at them under the influence of intoxication. This offence falls under the category of baseless slandering, the prescribed punishment for which is eighty stripes. So forty stripes is a reasonable punishment just for drinking. But with the passage of time when the people became immoderate, this punishment was enhanced to eighty stripes equal to punishment for baseless slandering.¹

The Imām Mālik and the Imām Abū Ḥanīfa and according to a tradition, Imām Shāfi'i also were of the opinion that eighty stripes should be inflicted for drinking wine. The Imām Aḥmad ibn Ḥanbal and according to another tradition, the Imām al-Shāfi'i also, were of the opinion that forty stripes should be inflicted for the crime of drinking wine. Ḥaḍrat 'Alī (Allāh be pleased with him) also considered forty stripes to be the punishment for it.

If the drinker of wine be a slave, male or female, the punishment for wine-drinking, with respect to

1. Shāh Waliullāh, *Hujjatullāh-il-Bāligha*, Vol. II, pp. 164, 165.

such, is forty stripes only, because the state of bondage induces only half punishment.

‘The Holy Prophet (peace and blessings of Allāh be upon him) did not prescribe any definite punishments in different circumstances.

‘Umar b. Sa‘id an-Nakha‘i told that he heard ‘Alī b. Abi Tālib (Allāh be pleased with him) as saying : ‘If I impose *Hadd* on any one, and he (in course of punishment) dies, I would not mind except in case of a drunkard. If he dies, I would pay indemnity for him because the Messenger of Allāh (peace and blessings of Allāh be upon him) has laid down no rule for it. (Bukhārī and Muslim)

Mode of Evidence

Wine-drinking is proved on the testimony of two witnesses ; and also by confession once made. It is recorded from Abū Yūsuf, that two confessions are requisite. But it is to be observed that the evidence of women against men is not admissible in wine-drinking, because the evidence of females is liable to variation, and they may be also suspected of absence of mind, or forgetfulness.

If a person makes confession to the drinking of wine, or any other intoxicating liquor, and afterwards retracts from such confession, punishment is not to be inflicted upon him, as the punishment of wine-drinking is purely a right of Allāh.

If a Muslim drinks wine and be seized whilst his breath yet smells of the wine, or be brought

before the Qāḍī whilst he is yet intoxicated therewith, and witnesses give evidence that "he has drunk wine", punishment for drinking wine is to be inflicted upon him; and in the same manner, punishment incurred by him when he makes confession of having drunk wine, whilst his breath yet retains the smell, because the offence of wine-drinking is proved upon him.

If a man makes confession of having drunk wine, after the smell has ceased, in this case punishment is not to be inflicted. The Imām Muḥammad, however, maintains that it is to be inflicted.

If a witness seize a drinker of wine at a time when he is intoxicated, or whilst he still retains the smell of the liquor, and carry him to a city where there is a Qāḍī, and in the meantime the flavour or the intoxication should cease, before they arrive at the seat of justice, yet in this case punishment for wine-drinking is to be inflicted upon that person, according to all the jurists, because there is an excuse for the delay, analogous to that which is created by distance of place in a charge of whoredom; and the witnesses are not suspected where such excuse exists.

If the smell of wine be discovered upon a person, or he should vomit wine, yet if witnesses have not actually seen him drinking it, punishment is not incurred, because the smell alone leads but to a very uncertain conclusion, as this appearance may proceed either from the person having drunk wine,

or from his having sat among wine-drinkers, from whom he may have contracted the smell ; and it is also possible that wine may have been administered to him by force, or menaces, in which case no punishment is incurred.

Punishment for wine-drinking is not incurred by intoxication alone, unless it be known that the person has been intoxicated by the voluntary drinking of wine, because men are sometimes inebriated by the use of articles which are permitted, such as mare's milk ; and men may also be sometimes compelled to drink wine, which is not a punishable offence, when thus committed by compulsion.

Mode of Execution

The punishment of a free person, for drinking wine or other intoxicating liquor, is eighty stripes (and to a slave forty stripes) and those eighty stripes are to be inflicted in every respect under the same rules and restrictions as in the case of whoredom. The wine-drinker must be striped naked to receive the punishment.

CHAPTER 9

THEFT (*SARIQA*)

Sariqa literally means the secretly taking away of another's property. In the language of the law, *Sariqa* signifies the taking away the property of another in a secret manner, at a time when such property is in custody. To constitute theft the following elements are essential :

1. The thief must be an adult of sound understanding.
2. The property must be in careful protection of the man.
3. The property must be taken out of the custody of another person in a secret manner.
4. The thief must have obtained full possession of the stolen property.
5. The property must be of some value which must not be less than the prescribed *Niṣāb* (limit).
6. The property must be movable.
7. Dishonest intention to take property.

First Element : The thief must be of an adult age and of sound understanding. *Hadd* of amputation of a hand is not applicable to an infant and a person of unsound mind. The Holy Prophet (peace and blessings of Allāh be upon him) says :

رَفَعَ الْقَلَمُ عَنْ ثَلَاثَةٍ : عَنِ الصَّبِيِّ حَتَّى يَبْلُغَ ، وَعَنِ النَّائِمِ
حَتَّى يَسْتَيْقِظَ وَعَنِ الْمَجْنُونِ حَتَّى يَنْفِقَ

“Three types of persons are exempt from the punishment of amputation of a hand, a child till he attains maturity, a sleeping person till he gets up and an insane person till he regains his senses.”

Second Element : Theft which calls for amputation of a hand shall be in relation to such property which is in careful protection of a man. There are provisions in the Hanafi Law to the effect that a thief's hand shall not be cut off for the theft of what cannot be guarded or is not worth guarding, being found in the land in great quantity, such as dry wood, hay, grass, reeds, game, fish, lime etc.

‘Abdullah b. ‘Abdur Raḥmān b. Abi Husain al-Makki reported Allāh's Messenger (peace and blessings of Allāh be upon him) as saying :

لَا قَطْعَ فِي ثَمَرِ مَعْلَى وَلَا فِي حَرِيسَةِ جَبَلٍ ، فَإِذَا أَوَاهُ الثَّمَرُ
وَالْجَرِينُ فَالْقَطْعُ فِيمَا بَلَغَ ثَمَنَ الْمَجِينِ

"A hand is not to be cut off for fruit which is hung up outside the wall or for a sheep stolen by night from the mountain but when the sheep is in its fold or the fruit in the place where it is dried a hand is to be cut off for whatever reaches the price of a shield." (*Mishkāt*)

Third Element : The third element which calls for amputation of a hand is that the property must be taken out of the custody of another person in a secret manner. Custody is of two kinds : 1st, by place, for example, a house or a shop ; and 2nd, by personal guard, which is by means of a personal watch over the property. It is narrated in *Sharh al-Sunna* :

أَنَّ صَفْوَانَ بْنَ أُمَيَّةَ قَدِمَ الْمَدِينَةَ فَنَامَ فِي الْمَسْجِدِ وَتَوَسَّدَ رِدَاءَهُ
فَجَاءَ سَارِقٌ وَآخَذَ رِدَائَهُ فَآخَذَهُ صَفْوَانٌ فَجَاءَ بِهِ إِلَى رَسُولِ اللَّهِ
صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَمَسْرَانُ تَقَطَّعَ يَدُهُ فَقَالَ صَفْوَانُ إِنِّي لَمْ
أَرِدْ هَذَا هُوَ عَلَيْهِ صَدَقَةٌ فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ
فَهَلَّا قَبْلَ أَنْ تَأْتِيَنِي بِهِ

"Ṣafwān b. Umayya came to Medina and slept in the mosque, using his sheet as a pillow. A thief came and took his sheet. Ṣafwān seized him and brought him to Allāh's Messenger (peace and blessings of Allāh be upon him) who ordered

that his hand should be cut off. Ṣafwān then said : This was not my intention. I give it to him as *Ṣadaqa*. Allāh's Messenger (peace and blessings of Allāh be upon him) said : Why did you not do so before bringing him to me."

(*Mishkāt*)

Fourth Element : The thief must have obtained full possession of the stolen property. Theft which calls for amputation of a hand, it is not enough that the thief has taken away the property of another person. He must take its possession completely.

Fifth Element : With regard to the amount of the value which constitutes a theft, there is some difference of opinion among the jurists. According to the Imām Abū Hanīfa, it is ten dirhams ; according to the Imām al-Shāfi'ī, it is the one-fourth of a dinar whilst the Imām Mālik holds that the sum of *Niṣāb* is three dirhams or its equivalent property which calls for amputation of a hand :

قَدْ عَائِشَةَ عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ لَا تُقَطَّعُ يَدُ السَّارِقِ

إِلَّا فِي رُبْعِ دِينَارٍ قِصَاعِدًا

“‘Ā'isha (Allāh be pleased with her) reported the Holy Prophet (peace and blessings of Allāh be upon him) as saying : The hand of a thief shall not be cut off except for one-fourth of a dinar and upwards.”

(*Agreed upon*)

عَنِ ابْنِ عُمَرَ قَالَ قَطَعَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَدَ سَارِقٍ فِي

مِجَنٍّ ثَمَنُهُ ثَلَاثَةُ دَرَاهِمَ

“Ibn ‘Umar reported that the Holy Prophet (peace and blessings of Allāh be upon him) cut off the hand of a thief for a shield, price of which was three dirhams.” (Agreed upon)

It should be borne in mind that, though there is variation in the minimum values of things for stealing which one's hand can be cut off, yet the value prescribed by the Imām Abū Ḥanīfa seems to be the standard one i.e., ten dirhams. The Imām bases his deduction on the fact that in case of punishment the maximum benefit of doubt is to be given to the criminal. Thus in this case it would be maximum value for stealing which the Holy Prophet (peace and blessings of Allāh be upon him) awarded punishment, that would be counted as the basic value.

Sixth Element : The subject of theft must be movable. It is an essential element because theft means taking away the property of another. It is possible in the case of movable property only. The land and things attached to the earth or permanently fixed to anything which is attached to the earth cannot be taken away from the possession of one person to another and hence these cannot be stolen.

Seventh Element : This is the most important part of the definition. It is the intention of the taker which must determine whether the taking or moving of a thing is theft or not. Where there is no intention to take it dishonestly, there is no theft.

Punishment

Theft deprives a man of one's hard-earned money and property. Therefore, it is an encroachment upon the property of a man without any justifiable reason and causes unrest in a society. Thieves are a menace to peaceful society and are looked upon with terror. With a view to put them under guard, strict measure has been ordained. The Holy *Qur'ān* says :

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جِزَاءً بِمَا كَسَبَا ذَلًّا
 مِنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ ۝

"And as for the man who steals and the woman who steals, cut off their hand as a punishment for what they have done, an exemplary punishment from Allāh, and Allāh is Mighty and Wise." (5 : 38)

If theft is committed for the second time, the second hand shall be cut off, and if for the third time, one foot shall be cut off, and if for the fourth time, the other foot shall be cut off :

وَعَنْ جَابِرٍ قَالَ جُنِيَ بِسَارِقٍ إِلَى النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ

فَقَالَ اقْطَعُوهُ فَقُطِعَ ثُمَّ جِيئَ بِهِ الثَّانِيَةَ فَقَالَ اقْطَعُوهُ فَقُطِعَ ثُمَّ
 جِيئَ بِهِ الثَّالِثَةَ فَقَالَ اقْطَعُوهُ فَقُطِعَ ثُمَّ جِيئَ بِهِ الرَّابِعَةَ فَقَالَ
 اقْطَعُوهُ فَقُطِعَ فَاتَى بِهِ الْخَامِسَةَ فَقَالَ اقْطَعُوهُ فَأَنْطَلَقْنَا بِهِ فَقَتَلْنَاهُ
 ثُمَّ اجْتَرَرْنَاهُ قَالِقَيْنَهُ فِي بَيْتٍ وَرَمَيْنَا عَلَيْهِ الْحِجَارَةَ

“Jābir reported that a thief was brought to the Holy Prophet (peace and blessings of Allāh be upon him) and he said: “Maim him”, so this was done. He was brought a second time and he said, “Maim him”, so this was done. He was brought a third time and he said, “Maim him”, so this was done. He was brought a fourth time and he said, “Maim him”, so this was done. He was brought a fifth time and he said, “Kill him”, so they took him away and killed him. They then dragged him and cast him into a well and threw stones over him.”

(Abū Dāwūd, Nasā’ī)

عَنْ أَبِي سَلَمَةَ عَنْ أَبِي هُرَيْرَةَ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ
 قَالَ فِي السَّارِقِ إِنْ سَرَقَ فَأَقْطَعُوا يَدَهُ ثُمَّ إِنْ سَرَقَ فَأَقْطَعُوا رِجْلَهُ
 ثُمَّ إِنْ سَرَقَ فَأَقْطَعُوا يَدَهُ ثُمَّ إِنْ سَرَقَ فَأَقْطَعُوا رِجْلَهُ

“Abū Salama quoted Abū Huraira’s authority to the effect that Allāh’s Messenger (peace and blessings of Allāh be upon him) said regarding a thief, “If he steals cut off his hand, if he steals

again cut off his foot, if he steals again cut off his hand, and if he steals again cut off his foot." (Mishkāt)

According to Hanafi School of Law, the punishment for the first offence is the cutting off of hand; for a second, that of the left foot up to ankle. And for a third no more amputation, but a long term imprisonment until the culprit shall presumably reform. Some maintain that for a third offence the culprit's left hand should be cut off and for a fourth offence, his right foot. Kitubi says that this tradition has been abrogated by the traditions stating that except for three things, murder, adultery and apostasy, killing is unlawful. Ḥaḍrat 'Alī (Allāh be pleased with him) refused to cut off another hand of a confirmed thief where one hand and foot had already been cut off. He remarked that he would be ashamed before Allāh that not a hand or a leg should be spared to enable him to grasp a thing or to go about.¹

Cases where no Amputation is to be incurred

Amputation is not incurred by the theft of such things as quickly decay and spoil, such as milk or fruit:

عَنْ رَافِعِ بْنِ خَدِيجٍ عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ لَا قَطْعَ فِي ثَمَرٍ وَلَا كَثْرٍ

1. Al-Ḥākim, *Al-Mustadrak*, Vol. IV, p. 382 ; *Al-Mabsūṭ*, Vol. IX, pp. 166-168.

‘Rāfi‘ b. Khadij reported the Holy Prophet (peace and blessings of Allāh be upon him) as saying: There is no cutting off of hand for (theft of) ripe fruits and white dates.”

(*Mishkāt*)

Amputation is not incurred by the theft of anything of a trifling nature, such as wood, bamboos, grass, fish, fowls and garden stuff.

The thief’s hand shall not be cut off if the thing stolen has no conventional value, even though it be otherwise regarded as of great worth. Of such may be regarded intoxicating spirits, because he may explain his intention in taking it, by saying, “I took it with a view to spilt it”; and also because some fermented liquors are not lawful property.

The hand is not to be cut off for stealing a guitar or tambourin, these being of use as idle amusements.

Amputation is not incurred by stealing the Holy *Qur’ān*, although Imām Shāfi‘i maintains that it is.

There is no amputation for stealing the door of a mosque. Nor is the hand struck off for stealing a crucifix or a chess board, as it is in the thief’s power to excuse himself by saying, “I took them with a view to break and destroy them, as things prohibited.” It is otherwise with a coin bearing the impression of an idol, by the theft of which amputation is incurred because money is not an object of worship.

The hand is not to be cut off for stealing a free born infant, although there be ornaments upon it,¹ because, according to early doctors, a free person is not a property²; but amputation is incurred by stealing an infant slave, although stealing of an adult slave does not incur amputation, as such an act does not come under the description of theft, being an usurpation or a fraud.

Amputation is not incurred for stealing a book, because the object of the thief can only be its contents and not the property.

The hand is not cut off for stealing a curdog, because such an animal is common property; nor for stealing utensil made of wood.

There is no amputation for stealing from the *Bait al-Māl* (Public Treasury) because everything there is common property of all Muslims, and in which the thief, as a member of the community has a share (upto a certain limit). And if a person steals

1. A person who surreptitiously carries away an infant of a free man is to be differently dealt with. The child lifter in fact makes a free human being a slave: he cannot give the stolen infant a life full of virtues and Islamic values. He is guilty of degrading the status of humanity, in other words of homicide. The doctors have left the case undecided.
2. The child is a property of the father, as expressly pronounced in the Holy *Qur’ān*: **وَالْبَنُونَ زِينَةُ الْحَيَاةِ الدُّنْيَا** : The son is a property of the father as declared by the Holy Prophet (peace and blessings of Allāh be upon him).

from property of which he in part is owner, amputation is not inflicted. Nor if a creditor steals from his debt is the hand cut off.

It cannot be pleaded that the above are not the cases of theft, but they are relevant for the purpose of showing that the amputation of hand is not the only punishment in the case of *Sariqa*. The following instances are quoted in this regard :

1. During a famine year Ḥaḍrat 'Umar (Allāh be pleased with him) refused to cut the hand of a person who had stolen away a she-camel and ordered two well-nourished camels to be delivered instead. (*Baihaqī*)¹
2. The slaves of Ḥāṭib stole away the camel of a person of the tribe of *Madia*. The culprits were produced before Ḥaḍrat 'Umar (Allāh be pleased with him), the Second Caliph. He first ordered that the hands be cut off but modified the same and directed that, in lieu of cutting off of the hands, the offenders should be punished with a penalty which should be felt. The owner was asked about the price of the camel. He said it was 400 dirhams. Ḥaḍrat 'Umar (Allāh be pleased with him) ordered the payment of 800 dirhams i.e., twice the amount.²

1. *Sunan* of al-Baihaqī, Vol. VIII, p. 278.

2. *Izālat al-Khaṣā'* Vol. II, p. 130 ; *Sunan Kubrā*, Vol. VIII, p. 278.

3. A person guilty of house-breaking was produced before Ḥaḍrat 'Alī (Allāh be pleased with him). He did not order the cutting of the hand but inflicted the punishment of whipping.¹

Thus it is not correct to say that for every offence of theft, the hand shall be cut.

There has been a good deal of criticism against the severe punishment of *qat' al-yad* (amputation of hand) by the Western people who consider it to be barbarous and cruel. Owing to this notion, the record of thieves and dacoits are growing in number and no amount of police vigilance can check the crimes of thefts and burglaries. It is satisfactory to note that owing to this severe punishment there is practically a stop to these crimes in countries where Islamic Law is in force, for example in Saudi Arabia. If a criminal dares to commit such crimes repeatedly, he becomes dangerous to the society and as such Islam deprives him of his bodily limbs so that he may not move and repeat such crimes.

Muḥammad Asad, a well-known Scholar and Commentator of the Holy *Qur'ān*, has written a very comprehensive note on this severe punishment. Here we quote it. He says : "The extreme severity of this Qur'ānic punishment can be understood only if one bears in mind the fundamental principle of Islamic Law that no duty (*taklif*) is ever imposed

1. *Kanz al-'Ummāl*, Vol. III, p. 117.

on man without his being granted a corresponding right (*ḥaqq*) ; and the term 'duty' also comprises, in this context, liability to punishment. Now, among the inalienable rights of every member of the Islamic Society—Muslim and non-Muslim alike—is the right to *protection* (in every sense of the word) by the community as a whole. As is evident from innumerable Qur'ānic Ordinances as well as the Prophet's injunctions forthcoming from authentic Traditions, every citizen is entitled to a share in the community's economic resources and thus, to the enjoyment of social security : in other words, he or she must be assured of an equitable standard of living *commensurate with the resources at the disposal of the community*. For, although the *Qur'ān* makes it clear that human life cannot be expressed in terms of physical existence alone—the ultimate values of life being spiritual in nature—the believers are not entitled to look upon spiritual truths and values as something that could be divorced from the physical and social factors of human existence. In short, Islam envisages and demands a society that provides not only for the spiritual needs of man, but for his bodily and intellectual needs as well. It follows, therefore, that—in order to be truly Islamic—a society (or State) must be so constituted that every individual, man and woman, may enjoy that minimum of material well-being and security without which there can be no human dignity, no real freedom and, in the last resort, no spiritual progress : for, there can be no real happiness

and strength in a society that permits some of its members to suffer undeserved want while others have more than they need. If the whole society suffers privations owing to circumstances beyond its control (as happened, for instance, to the Muslim Community in the early days of Islam), such shared privations may become a source of spiritual strength and, through it, of future greatness. But if the available resources of a community are so unevenly distributed that certain groups within it live in affluence while the majority of the people are forced to use up all their energies in search of their daily bread, poverty becomes the most dangerous enemy of spiritual progress, and occasionally drives whole communities away from God-consciousness and into the arms of soul-destroying materialism..... Consequently, the social legislation of Islam aims at a state of affairs in which every man, woman and child has (a) enough to eat and to wear (b) an adequate home (c) equal opportunities and facilities for education, and (d) free medical care in health and in sickness. A corollary of these rights is the right to productive and remunerative work while of working age and in good health, and a provision (by the community or the State) of adequate nourishment, shelter, etc., in cases of disability resulting from illness, widowhood, enforced unemployment, old age, or under-age. As already mentioned, the communal obligation to create such a comprehensive social security scheme has been laid down in many Qur'ānic verses, and has been amplified and

explained by a great number of the Prophet's commandments.....

"It is against the background of this social security scheme envisaged by Islam that the Qur'ān imposes the severe sentence of hand-cutting as deterrent punishment for theft. Since, under the circumstances outlined above, "temptation" cannot be admitted as a justifiable excuse, and since in the last resort, the entire socio-economic system of Islam is based on the faith of its adherents, its balance is extremely delicate and in need of constant, strictly-enforced protection. In a community in which every one is assured of full security and social justice, any attempt on the part of an individual to achieve any easy, unjustified gain at the expense of other members of the community must be considered *an attack against the system as a whole*, and must be punished as such: and, therefore, the above ordinance which lays down that the hand of the thief shall be cut off. One must, however, always bear in mind the principle mentioned at the beginning of this note: namely, the absolute inter-dependence between man's rights and corresponding duties (including liability to punishment). In a community or State which neglects or is unable to provide complete social security for all its members, the temptation to enrich oneself by illegal means often becomes irresistible—and, consequently, theft cannot and should not be punished as severely as it should be punished in a state in which social security is a reality in the full sense of the word. If the society

is unable to fulfil its *duties* with regard to every one of its members, it has no *right* to invoke the full sanction of Criminal Law (*Hadd*) against the individual transgressor, but must confine itself to milder forms of administrative punishment. (It was in correct appreciation of this principle that the great Caliph 'Umar (Allāh be pleased with him) *waived* the *hadd* of hand-cutting in a period of famine which afflicted 'Arabia during his reign.) To sum up, one may safely conclude that the cutting off of a hand in punishment for theft is applicable only within the context of an already existing, fully functioning social security scheme, and in no other circumstances."¹

Mode of Evidence

Theft is proved on the testimony of two witnesses or by the confession of the accused. The Qāḍī must examine the witnesses as to the manner, time and place of the theft. The thief must also be held in confinement, or suspicion, until the witnesses be fully examined.

It is incumbent upon the witnesses to bear evidence to the property, by testifying that "a certain person took such property", in order to preserve the right of the proprietor; but the word "taken" must be used instead of "stolen," to the end that the crime may be kept concealed. Besides, if the word "stolen" was used, the thief would be

1. Muhammad Asad, *The Message of the Qur'ān*, Vol. I. pp. 107-109.

rendered liable to amputation ; and as, where amputation is incurred, there is no responsibility for the property, the proprietor's right would be destroyed.

Mode of Execution

The right hand of the thief is to be cut off at the joint of the wrist and the stump afterwards cauterised,¹ and for the second theft, foot, and for any theft beyond that he must suffer imprisonment.

If a party commit a theft, and each of the party receive ten dirhams, the hand of each is to be cut off ; but if they receive less than ten dirhams each, they are not liable to amputation.

The freeman and the slave are on equal footing with respect to punishment for theft, and the hand of a slave is to be cut off in the same manner as the hand of a free Muslim.

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1. Or, in modern age, medicine may be applied to stop bleeding. *Hism* (cautery) is exceedingly painful : and should therefore, be avoided under the principle of *Iḥsān*.

CHAPTER 10

DACOITY, HIGHWAY ROBBERY (QAT' AL-TARIQ) OR WAGING WAR AGAINST THE STATE

All conceivable offences against the State, such as treason or public disorder or wilful defiance of the Law of Allāh and of constituted authority are made punishable by the Holy *Qur'ān* as under :

إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ
تَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِمَّنْ
خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ۚ ذَٰلِكَ لَهُمْ خِزْيٌ فِي الدُّنْيَا وَلَهُمْ
فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ ۝ إِلَّا الَّذِينَ تَابُوا مِنْ قَبْلِ أَنْ تَقْرَأُوا
عَلَيْهِمْ ۖ فَاعْلَمُوا أَنَّ اللَّهَ غَفُورٌ رَحِيمٌ ۝

“The punishment of those who wage war against Allāh and His Apostle, and strive with might and main for mischief through the land is : execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land : That is their digrace in this world,

and a heavy punishment is theirs in the Hereafter. Except for those who repent before they fall into your power : In that case, know that Allāh is Oft-forgiving, Most Merciful." (5 : 33, 34)

In the above verse "the land" refers to that country or territory in which the maintenance of law and order is the responsibility of the Islamic State and to "wage war against Allāh and His Messenger" is to wage war against the righteous system of government established by the Islamic State. As Allāh likes that such a system of government should be established, He sent His Messenger to establish an equitable system of government, which should guarantee peace and justice to human beings, to animals, to trees, to vegetation and to everything in the earth, which may enable human beings to develop to the fullest their natural capabilities ; which should exploit natural resources of the earth for the true progress and improvement of humanity and not for its destruction. It is obvious that any attempt, big or small, to undermine or overthrow such an established system, is in reality a war against Allāh and His Messenger. It does not make any difference whether that mischief is created by criminals and murderers who cause disorder in the settled and peaceful society or by armed forces who attempt to overthrow the Islamic State and establish some corrupt un-Islamic System instead. And every sovereign treats such a violation directed against his authority or against any of his officials as war against himself.

Punishment

In accordance with the above verse such offences are made punishable with any one of the four punishments, that is (1) beheading, (2) crucifixion, (3) Cutting of hand and feet from opposite sides, and (4) exile from the land.

By the unanimity of Commentators on the Holy *Qur'ān*, the warring people referred to in the above verses are highwaymen, dacoits and the like. According to Islamic law-books, their treatment is :

- (i) For murder accompanied by plunder, beheading followed by crucifixion.
- (ii) For murder only, beheading.
- (iii) For plunder only, without loss to life, the amputation of hand and foot from opposite sides.
- (iv) For only banding together with the intent of plunder and murder, but having as yet committed nothing of the kind, discretionary punishment may be inflicted.

The banishment mentioned in the verses is one of the discretionary punishments. It is interpreted either as imprisonment, expulsion from the state, externment, or confinement to a border district with all its hazards. However, expulsion from the state is never upheld if the culprits are of the Muslim State.¹

1. Al-Māwardī, *Al-Aḥkam al-Sulṭāniya*, pp. 102-106 ; Kaisānī, *Badā'i'*, Vol. VII, pp. 94, 95 ; Sarakhsī, *Mabsūṭ*, Vol. IX, p. 135.

If subjects of a Muslim State commit highway robbery in a foreign country even against Muslim subjects, their case may not be heard in a Muslim Court¹ though they may be extracted if there is treaty to that effect. On the other hand, if foreigners enter Muslim territory and commit depredation on passers-by, their case may be heard in the Muslim court.² Ibn Taimiyya³ says that even if the highwayman is superior in status to the murdered person—if, for example, he is a Muslim, a freeman or a Muslim subject, and the murdered person is a non-Muslim, a slave, or a foreigner residing in the Muslim territory—the murderer must be sentenced to death. Citing a precedent, Ibn Taimiyya refers to the fact that the Caliph 'Umar (Allāh be pleased with him) inflicted capital punishment upon the watchman of a gang of highwaymen.

As the Qur'ānic verses quoted above enjoin, if individually or *en masse* the gang submit themselves to authorities before government can lay hands on them, and give assurance of repentance and future good behaviour, the members may be pardoned. In this case, no action may be brought against them for their past crimes and illegal activities. It should be noted that an abstract of these alternative punishments has been given for the benefit of the Qāḍī so

1. Sarakhsī, *Mabsūṭ*, Vol. IX, pp. 203, 204 ; Shaibānī, Ch. *Qaṭ' al-Ṭarīq*.
2. Shaibānī, Ch. *Qaṭ' al-Ṭarīq*.
3. Ibn Taimiyya, *Al-Siyāsa al-Sharī'ah*, pp. 36, 37.

that he may exercise his discretion and award punishment according to the nature and extent of the crime and exigencies of the case. The real object of this is to show that any attempt by any person residing in the Islamic State, to overthrow its government is high treason and a most heinous crime and that the offender is liable to be awarded any of these capital punishments according to circumstances.

However, if the offenders have refrained from creating mischief and from making any attempt at overthrowing the righteous system, and have shown by their conduct that they are peace-loving and law-abiding citizens, none of the above mentioned punishments will be inflicted upon them, even if they might have committed any of the crimes before repentance. They would, however, be liable to be called to account in a court of law for any offence against any individual, such as murder, theft, etc., but they will not be tried for any previous offence of treason or rebellion or war against Allāh and His Messenger (peace and blessings of Allāh be upon him).

Mode of Execution

According to the *Hidāya*, highway robbers are punished as under :

1. Those who are seized before they have robbed or murdered any person, or put any person in fear, are to be imprisoned by the Qāḍī until their repentance is evident.

2. Those who have robbed but have not murdered, are to have their right hand and left foot struck off.
3. Those who have committed murder but have not robbed, are punished with death.
4. Those who have committed both robbery and murder, are punished according to the option of the Qāḍī. If he pleases, he can first cut off a hand and foot and then put them to death by the sword, or by crucifixion; or he may kill them at once without inflicting amputation. If any one among a band of robbers be guilty of murder, the punishment of death must be inflicted upon the whole band.

CHAPTER 11

RETALIATION (*QIṢĀṢ*)

The Arabic term *Qīṣāṣ* is almost synonymous with "*Musāwāh*" making a thing equal to another thing : in this instance, making the punishment equal (or appropriate) to the crime. This word is derived from the verb root *Qaṣṣa* which means : "He followed, after his track or footsteps or he endeavoured to track him." Since the culprit is tracked and punished, this procedure is, therefore, known as *Qīṣāṣ*.

The subject of *Qīṣāṣ* must be considered, first, as to occasions affecting life and, secondly, as to retaliation in matters short of life. The former are called "Crimes against Person" while the latter are termed as "Crimes against Body."

Of Retaliation affecting Life (*Murder*)

Islam attaches the greatest importance to the sanctity of human life and the man who sheds the blood of another person shall have to suffer the torment of Hell and the killing of one man will be counted as the wholesale slaughter of humanity. There are many verses of the *Qur'ān* and the *Aḥādīth*

of the Holy Prophet (peace and blessings of Allāh be upon him) which refer to the utmost sanctity that Islam attaches to human life. The Holy *Qur'ān* says :

وَالَّذِينَ لَا يَدْعُونَ مَعَ اللَّهِ إِلَهًا آخَرَ وَلَا يَقْتُلُونَ النَّفْسَ الَّتِي

حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ وَلَا يَزْنُونَ وَسَنُفْعِلُ ذَلِكَ يَلْقَ آثَامًا ۝

يُضَعَّفُ لَهُ الْعَذَابُ يَوْمَ الْقِيَمَةِ وَيُحْلَدُ فِيهِ مَهَانًا ۝

“And they call not upon another god with Allāh and slay not the soul which Allāh has made sacred, except in the cause of justice, nor commit fornication and he who does this (not only) meets punishment (but) the Penalty on the Day of Judgment will be doubled to him, and he will abide therein in disgrace for ever.”

(25 : 68, 69)

The above verses clearly show that the gravest crime in regard to the relation of man with man is to take away his life without justification. The concluding part of the verse which tells that the chastisement will be doubled on the Day of Resurrection lends support to a *hadīth* narrated on the authority of ‘Abdullāh (b. Mas‘ūd) that Allāh’s Apostle (peace and blessings of Allāh be upon him) said : No person who is killed unjustly, but the share of (this offence of his also) falls upon the first son of Adam, for he was the first to introduce killing. It means that the offenders shall have to carry not

only the burden of the offences committed by them but also of those who committed these crimes subsequent to their crimes since it was they who led the people to the path of cruelty.

‘Abdullah (b. Mas‘ūd) reported Allāh’s Messenger (peace and blessings of Allāh be upon him) as saying: The first (thing) that will be decided among people on the Day of Judgment will pertain to bloodshed.

(Muslim)

Islamic Law takes cognizance of the following five kinds of homicide :

1. Wilful Murder (*Qatl al-‘Amd*)

Qatl al-‘Amd is termed as wilful murder where the perpetrator wilfully kills a person with a weapon, or something that serves for a weapon, such as club, a sharp stone, or fire. If a person commits a wilful murder, two points are established ; first, that the murderer is a sinner deserving of Hell, for it is laid down in the Holy *Qur’ān* :

وَمَنْ يَقْتُلْ مُؤْمِنًا مُتَعَمِّدًا فَجَزَاؤُهُ جَهَنَّمُ خَالِدًا فِيهَا وَغَضِبَ اللَّهُ

عَلَيْهِ وَلَعَنَهُ وَآمَدَ لَهُ عَذَابًا عَظِيمًا ۝

“As regards the one who kills a Believer wilfully, his recompense is Hell, wherein he shall abide for ever. He has incurred Allāh’s wrath and His curse is on him, and Allāh has prepared a woeful torment for him.” (4 : 93)

and secondly, that he is liable to retaliation. In the Holy *Qur'ān* the law of just retribution has been described in the following verse :

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ ۚ الْحُرُّ بِالْحُرِّ
وَالْعَبْدُ بِالْعَبْدِ ۚ وَالْأُنْثَىٰ بِالْأُنْثَىٰ ۚ

“O Believers, the law of retribution has been prescribed for you in cases of murder ; if a free man commits a murder, the freeman shall be punished for it and a slave for a slave : likewise if a woman is guilty of murder the same shall be accountable for it.” (2 : 178)

The ‘Arabic term “*Qisās*” stands for the return of life for life in cases of murder. It does not, however, mean that the murderer should be killed in the same manner in which he committed the murder. It only means that his life should be taken as he took the life of the other.

The punishment to be inflicted for this crime is death. A free man shall die for a free man, a slave for a slave, and a female for a female. These words, however, are not to be taken too strictly ; for, according to the *Sunnah* Law a man shall be put to death also for the murder of a woman. According to the Imām Abū Ḥanifa a man is liable to be so punished for the murder of another man’s slave. But, on the other hand, a father is not slain for his child but a child is slain for the murder of his father : a master is not slain for the murder of

his own slave, or for the slave of his child. Regard is also to be had to a difference in religion, so that a Muslim, though a slave, shall not be put to death for the murder of an unbeliever, though he be a freeman. According to the Imām Abū Ḥanīfa a Muslim is put to death for killing an unbeliever, but Imām al-Shāfi'i maintains otherwise because the Prophet (peace and blessings of Allāh be upon him) said : "A Muslim shall not suffer death for an unbeliever."

Anas b. Mālik reported that a Jew crushed a girl's head between two stones and she was asked who had done this to her—has so and so (done it) until they named a Jew. She indicated with the nod of her head (that it was so). So the Jew was caught, and he made confession (of his guilt). And Allāh's Messenger (peace and blessings of Allāh be upon him) commanded that his head be smashed with stones.

According to the Imām al-Nawawī this *ḥadiīh* elucidates so many points pertaining to retribution and the punishment of murder :

- (a) The male can be killed in retribution to the murder of a female.
- (b) The intentional murder can be retaliated by killing the criminal in the same way as he murdered the man.
- (c) The statement of the dying man carries enough weight as it gives a clue to the arrest of the murderer, but he cannot be

punished simply on the basis of this statement. For punishing him there should either be the statement of two reliable witnesses or confession of the criminal himself having committed the crime. This confession should be without any external pressure or without any consideration. It should be a simple statement of fact without any other motive or design.

- (d) The circumstantial evidence should lend full support to his statement and in no way belie his confession.¹

According to the Islamic Law murder is a compoundable offence. Although retaliation is the punishment for wilful murder, yet the heirs or next of kin can either forgive or compound the offence. The Holy *Qur'ān* says :

فَمَنْ عَفَىٰ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتَّبَاعُ بِالْمَعْرُوفِ وَأَدَاءُ إِلَيْهِ
بِإِحْسَانٍ ذَلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ فَمَنِ اعْتَدَىٰ بَعْدَ ذَلِكَ
فَسَاءَ عَذَابُ إِلَيْهِمْ ۝ وَلَكُمْ فِي الْقِصَاصِ حَيَوةٌ يَا أُولِي الْأَلْبَابِ
لَعَلَّكُمْ تَتَّقُونَ ۝

“But in case the injured brother is willing to show leniency to the murderer, the blood-money

1. Al-Nawawī, Vol II, p. 58.

should be decided in accordance with the common law and the murderer should pay it in a genuine way. This is an allowance and mercy from your Lord. Now there shall be a painful torment for any one who transgresses the limits after this. O men of understanding, there is (security of) life for you in the law of retribution, that you may ward off (evil).” (2 : 178, 179)

Islamic Law, therefore, allows the relatives of the murdered man the right of pardoning the murderer, if they deem it proper. In that case, court cannot insist on taking his life. Of course, he will have to pay compensation money for it, if the rightful claimants demand it.

However, the next of him may, if he wills, refuse to accept a fine, and demand that the murderer be handed over into his hands. On the other hand, having once accepted a money payment, he is strictly forbidden to take any revenge on the murderer in future.

As we have seen, a peculiar characteristic of this law concerning murder is, that it may be compounded for a money payment.

In *Qisās* lies the safeguard of the Community as it is an effective measure by which the safety of the life of the members of a society can be secured. The objective of *Qisās* is the protection of individuals and society, and not ‘revenge’. Islam has, by this measure of *Qisās* made the provision for the suppres-

sion of crime and at the same time kept open the door for the display of the noble qualities of benevolence and mercy.

2. Manslaughter (*Qatl Shibhu'l-'Amd*)

It is a semblance of wilful murder where the perpetrator strike a man with something which is neither a weapon nor serves as such.

The argument adduced by the Imām Abū Hanīfa is a saying of the Prophet (peace and blessings of Allāh be upon him) : "killing with a rod or stick is not a murder, but only manslaughter, and the fine for it is a hundred camels, payable within three years."

Manslaughter, is held to be sinful and to require expiation, and it excludes the man-slayer from inheriting the property of the slain.

3. Homicide by Misadventure (*Qatl al-Khaṭa'*)

Homicide by misadventure is of two kinds : error in intention, and error in the act. Error in the act is where a person intends a particular act, and another act is thereby occasioned ; as when, for instance, a person shoots an arrow at a mark and it hits a man. Error in intention, on the other hand, is where the mistake occurs not in the act, but with respect to the subject ; as where a person shoots an arrow at the man supposing him to be game ; or at a Muslim, supposing him to be a hostile infidel. The slayer by misadventure is required to free a Muslim slave, or fast two months successively,

and to pay a fine within three years. He is also excluded from inheriting the property of the slain.

4. Homicide of similar nature to Homicide by Misadventure (*Qatl Qā'im Maqām al-Khata'*)

It is where, for example, a person walking in his sleep falls upon another, so as to kill him by the fall. It is subject to the same rules with homicide by misadventure.

5. Homicide by Intermediate Cause (*Qatl bi-Sabab*)

It is where, for instance, a man digs a well, or sets up a stone, and another falls into the well, or over the stone, and dies. In this case a fine must be paid, but it does not exclude from inheritance, nor does it requires expiation.

Thus we see that by the Islamic Law all these different crimes, namely, wilful murder, manslaughter (unintentional), and personal injury may, without exception, be met with by a fine.

Of Retaliation Short of Life

Further on retaliation the Holy *Qur'ān* says ;

وَكُتِبْنَا عَلَيْهِمْ فِيهَا أَنْ النَّفْسَ بِالنَّفْسِ وَالْعَيْنَ بِالْعَيْنِ وَالْأَنْفَ
بِالْأَنْفِ وَالْأُذُنَ بِالْأُذُنِ وَالْيَدَ بِالْيَدِ وَالْجُرُوحَ قِصَاصًا ۚ فَمَنْ
تَصَدَّقَ بِهِ فَهُوَ كَفَّارَةٌ لَّهُ ۚ

"And therein have We enacted for them, a life for a life, an eye for an eye, and a nose for a nose, and an ear for an ear, and a tooth for a tooth, and for wounds retaliation. But whoso remitteth it as alms, shall have therein the expiation of his sin." (5 : 45)

The above verse shows further that retaliation is allowed also for wounds. It is "a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth and for wounds retaliation."

It may be asked, did Islamic Law intends that this expression, "a life for a life, an eye for an eye," etc., should be taken literally. The expression "eye for eye, and tooth for tooth" being only a proverbial manner of speaking¹, the sense whereof amounts to this, that every one shall be punished by the Qāḍī according to the heinousness of the crime.

If a person wilfully strikes off the hand of another, his hand is to be struck off in return, because it is said in the Holy *Qur'ān* :

وَالْجُرُوحُ قَبَاصٌ ط

"There is retaliation in case of wounds." (5 : 45)

If a person strikes off the foot of another, or cuts off the nose, retaliation is inflicted in return. If a person strikes another on the eye, so as to force

1. As it occurs in the *Bible* also.

the member, with its vessels, out of the socket, there is no retaliation ; it is impossible to preserve a perfect equality in extracting an eye. If, on the contrary, the eye remains in its place, but the faculty of seeing be destroyed, retaliation is to be inflicted, as in this case equality may be effected by extinguishing the sight of the offender's corresponding eye with a hot iron. If a person strikes out the teeth of another, he incurs retaliation : for it is said in the Holy *Qur'ān* :

وَالْبَيْنُ بِالْبَيْنِ لَا

"A tooth for a tooth."

(5 : 45)

Retaliation is not to be inflicted in the case of breaking any bones except teeth, because it is impossible to observe an equality in other fractures. There is no retaliation in offences short of life, between a man and a woman, a free person and a slave, or one slave and another slave ; but Imām Shāfi'ī maintains that retaliation holds in these cases. Retaliation for parts of the body holds between a Muslim and an unbeliever, both being upon an equality between each other with respect to fines for the offences in question.

If the corresponding member of the maimer be defective, nothing more than retaliation on that defective member, or a fine ; and if such member be in the meantime lost, nothing whatever is due.

There is no retaliation for the tongue or the

virile member. Compensation is however necessary.

Although, however, the Holy Prophet (peace and blessings of Allāh be upon him) says nothing as to a money payment in the case of wounds, this is allowed by the Muslim jurists, the amount being as follows :

1. For a member of the body that is single, such as a nose, the whole price of blood, as in the case of murder.
2. For a member of which there are two, and not more, such as hand, half the price of blood.
3. For a member of which there are ten i.e., a finger or a toe, a tenth of the price of blood.
4. When a man maims or wounds a woman the fine is half of that for the same injury to a man.
5. When a free man wounds a slave, the fine varies according to the value of slave.
6. When a man is deprived of any of his five senses, or is dangerously wounded, or is grievously disfigured for life, the fine is the whole price of blood.

Islamic Law quite in agreement with the great stress which he lays on almsgiving, favours the remitting as alms the penalty enacted by him for

injury. The Holy Qur'an says :

وَالْجُرُوحَ قِصَاصًا ۚ فَمَن تَصَدَّقَ بِهِ فَهُوَ كَفَّارَةٌ لَّهُ

"Wounds should be punished by retaliation ; but whoso remit it (as alms), it is an expiation for him." (5 : 45)]

The Islamic Penal Law recognizes three types of punishments i.e. Fixed punishment (Hadd), Retaliation (Qiyas) and discretionary punishment (Ta'zir). Hadd and Qiyas are restricted to offences for which punishments are prescribed in the Holy Qur'an and the Sunnah. Under Ta'zir, however, the punishment for all offences not covered by Hadd or Qiyas. This chapter will be limited to a discussion of the definition, origin and kinds of Ta'zir punishment.

Definition
The word Ta'zir is derived from the verb *ta'azara* which means prevent ; to respect and to restrain. The word is used in the first and second meanings in the Holy Qur'an. However, the Islamic legal terminology takes a punishment named Ta'zir at preventing a criminal from committing further crimes, and, secondly, at reforming him. Ibn Farab, in his well-known book *Ta'lim al-Mu'allim*, tried to specify the purpose of Ta'zir, by saying that it is

CHAPTER 12

TA'ZIR IN THE ISLAMIC PENAL SYSTEM

The Islamic Penal Law recognizes three types of punishments i.e., Fixed punishment (*Hadd*), retaliation (*Qisās*) and discretionary punishment (*Ta'zir*). *Hadd* and *qisās* are restricted to offences for which punishments are prescribed in the Holy *Qur'ān* and the *Sunnah*. Under *ta'zir* comes the punishment for all offences not covered by *Hadd* or *Qisās*. This chapter will be limited to a discussion of the definition, origin and kinds of *ta'zir* punishment.

Definition

The word *ta'zir* is derived from the verb '*azar*' which means prevent; to respect and to reform. The verb is used in its first and second meanings in the Holy *Qur'ān*¹. However, in Islamic legal terminology *ta'zir* is a punishment aimed firstly at preventing a criminal from committing further crimes, and, secondly, at reforming him. Ibn Farḥūn, in his well-known book *Tabṣirat al-Hukkām*, tried to specify the purpose of *ta'zir*, by saying that it is

1. *Al-Qur'ān*, 5 : 12 ; 7 : 157 ; 48 : 9.

a "disciplinary, reformatory and deterrent punishment."¹ This indicates the fact that the two aspects i.e., reformatory and deterrent, are combined here. To deter is the real basis of *ta'zir*, while reformation comes, in fact, as a means thereto.

However, *ta'zir* is defined as "discretionary punishment to be inflicted for transgression against Allāh, or against an individual, for which there is neither a fixed punishment nor a penance or expiation (*Kaffara*).² This definition excludes all sorts of crimes for which specific punishment is prescribed in the *Qur'ān* and the *Sunnah*.

Ta'zir is not mentioned in the Holy *Qur'ān*, and *Hadīth* has very little to record about it. This necessitates to trace out the possible origin (*aṣl*) of *ta'zir* punishment in both the Holy *Qur'ān* and the *Sunnah*.

Ta'zir in the Light of the Holy Qur'ān and the Sunnah

We find in the Holy *Qur'ān* and the *Sunnah* reference to some types of crimes for which there is no fixed punishment and where it is left to the discretion of the Qāḍī to decide what sort of punishment to impose, and how to inflict it. An instance of this is the *Qur'ānic* verse which reads :

وَالَّذِينَ يَأْتِيهَا مِنْكُمْ فَأَذَوْهُمَا ۚ

"If two men among you are guilty of lewdness, punish them both." (4 : 16)

1. Ibn Farḥūn, *Tabṣiraḥ*, Cairo, 1301 A.H., Vol. II, p. 200.

Another verse in which the authority to punish is given in the Holy *Qur'ān* in similarly flexible terms is as under :

وَالَّتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَاهْجُرُوهُنَّ فِى الْمَضَاجِعِ
وَأَضْرِبُوهُنَّ ۚ

“As to those women on whose part you fear disloyalty and ill-conduct, admonish them (first), (next), refuse to share their beds and (last) beat them (lightly).” (4 : 34)

This verse is concerned with the treatment of wives who disobey their husbands. Although the methods of dealing with such disloyal wives are laid down and are to be used consecutively, a lot is left to the discretion of the husband, who is the head of the family. He is to have a free hand in deciding how to use his discretion.

It is this discretion which some jurists considered as the origin of the *ta'zir* punishment (*al-aṣl fil-ta'zir*). This view is based on *qiyāṣ* (analogy). That is to say that the husband as the head of the family, the basic unit of society, has been given such discretion in order to safeguard the interests of his family and its members. Consequently, the ruler of the whole society and his representative *e.g.*, the judges, must be given the discretion to safeguard the interests of the Society when these are threatened by actions or omissions which fall outside the

limits of the fixed punishments (*al-Ḥadd*), and the punishment of retaliation (*al-Qiṣāṣ*).

Accordingly, it cannot be said, as it has been, that the Holy *Qur'ān* does not know this kind of punishment. On the contrary, the *Qur'ān* laid down the principle from which the *ta'zīr* punishment is deduced. By paying more attention to the above verses of the Holy *Qur'ān* one can say that the legal principles of *ta'zīr* are expressed in the Holy *Qur'ān*, implicitly, if not explicitly.

In the *Sunnah*, more examples and cases of *ta'zīr* are found. All these cases have later been used, in one way or the other, to construct the juristic formulation of *ta'zīr* as a part of the Islamic Penal Law. So far as the jurists are concerned, they are indebted to these *Aḥādīth* for their knowledge and understanding of *ta'zīr*. It is true that the decisions of the Companions of the Holy Prophet (peace and blessings of Allāh be upon him) relating to *ta'zīr* appear more frequently in the manuals of Islamic Law, especially the decisions of Ḥadrat 'Umar (Allāh be pleased with him), but these decisions in turn, are based on the Prophet's traditions and practices.

The following are some of the traditions dealing with cases of *ta'zīr* :

1. Once a Companion of the Holy Prophet (peace and blessings of Allāh be upon him) injured his slave, as a punishment for his having had sexual relations with a female

slave. When the Holy Prophet (peace and blessings of Allāh be upon him) saw the injured slave, he freed him. This was a punishment for the Companion's misconduct.¹

2. Muslim and Abū Dāwūd related a tradition according to which the Holy Prophet (peace and blessings of Allāh be upon him) deprived a man of his share of the spoils of a war because of a misdeed committed against the Commander of the army.²

3. After the Prophet's return to Medina from the battle of Tabūk some of the Companions who had not gone with him confessed that they had had no real reason to stay at Medina and not join the army. The Holy Prophet (peace and blessings of Allāh be upon him) ordered the Muslims to avoid any contact with them; their wives were not allowed to share their beds. Fifty days later, a Qur'ānic verse was revealed saying that Allāh had forgiven them and accepted their repentance. This Prophet's order to avoid and ignore the men, was a *ta'zīr* punishment imposed upon them for their absence from the Muslim army.³

1. Ibn al-Qayyim, *Ghāththa al-Lahfān*, Vol. I, Cairo, 1939, p. 332.

2. Ibn al-Qayyim, *I'lām al-Muwagga'in*, Vol. II, p. 98.

3. Ibn al-Qayyim, *Zād al-Ma'ād*, Vol. III, Cairo, 1379 A.H., pp. 11-13.

4. For the theft of fruit of a value of less than that for which the *Hadd* punishment is inflicted, the Holy Prophet (peace and blessings of Allāh be upon him) said that the thief must pay "double its value and be liable to punishment." Here in this case the "double value" is a fine which may be interpreted as *ta'zīr*. A more obvious reference to *ta'zīr* is the last statement of the tradition: "and be liable to punishment." Punishment here is left entirely to the discretion of Qāḍī.¹

5. Regarding *Zakāt*, the Holy Prophet (peace and blessings of Allāh be upon him) said: "Who gives it will be rewarded by Allāh, and who refuses to give it, from him it will be taken, and we will take one half of his property, not for Muḥammad (peace and blessings of Allāh be upon him) or his family but for the *Bāit al-Māl* (State Treasury)." This imposing of fine upon the offender is also a sort of *ta'zīr* punishment.²

6. It is a Qur'ānic Command that if a debtor is in financial straits, the creditor must give him a chance to pay his debt. The Holy Prophet (peace and blessings of Allāh be upon him) accordingly commanded that when a rich man refuses to pay his debt,

1. *Mishkāt al-Maṣābīḥ*, Vol. II, p. 146,

2. *Ibid.*, p. 331.

he should be punished. In this tradition again, the Holy Prophet (peace and blessings of Allāh be upon him) did not explain what kind of punishment he meant to be imposed for this deed or its amount.¹ The justification for allowing *ta'zīr* punishment here is that such a situation should be dealt with keeping in view the circumstances of both the creditor and the debtor, and the general financial condition at a given moment. What is important, however, is that this tradition represents a case for which the Holy Prophet (peace and blessings of Allāh be upon him) ordered *ta'zīr* punishment.

In the light of the above discussion, one can easily conclude that *ta'zīr* punishment is based on the above mentioned Qur'ānic verses, and traditions of the Holy Prophet (peace and blessings of Allāh be upon him). It is true that the development of this system of punishment took place at a comparatively later stage by different Schools of Law. Nevertheless, the claim that the Holy *Qur'ān* does not know it, and the *Sunnah* has very little to record about it is totally unfounded.

Kinds of Ta'zīr Punishment

Unlike the *Hadd* or *Qisās* punishments, *ta'zīr* punishments are not specific. The judge, in cases

1. *Mishkāt al-Maṣābīḥ*, Vol. II, p. 112.

of offences for which *ta'zīr* punishment is prescribed, has a wide range of punishments from which he can select any one suitable for the particular crime, keeping in view the circumstances of the criminal, his record, and his psychological condition.¹ The authority of the judge is limited by his obligation not to order a punishment which is not allowed by Islamic law. Here the punishments allowed as *ta'zīr* will be discussed briefly; but the most important ones will be dealt with in more detail. These punishments represent what was known, and actually used, in Islamic legal texts and practice. They are by no means exclusive.

1. Admonition (*al-Wa'z*)

Admonition means calling the transgressors attention to the fact that he has acted unlawfully. The purpose of admonition is to remind the offender or to inform him of his misdeed.² For example, as the first stage in dealing with wives in cases of disobedience, the Holy Qur'ān says :

وَالَّتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ

“As to those women on whose part you fear disloyalty and ill-conduct, admonish them (first).” (4 : 34)

This sort of treatment of the offender must be restricted to those who commit minor offences for

1. Ibn Nujaym, *al-Baḥr al-Rā'iq*, Vol. V, p. 44.

2. 'Amer, *al-Ta'zīr*, p. 369.

the first time, provided the judge thinks that it is enough to reform the offender and prevent him from any further transgression.¹

2. Reprimand (*al-Tawbīkh*)

Reprimand may be through any word or act which the Qāḍī feels sufficient to serve the purpose of *ta'zīr*. Jurists usually refer to some specific words and acts as a means of reprimand. Means of reprimand, however, may vary according to the offence and conduct of the offender.²

3. Threat (*al-Taḥdīd*)

Threat is a *ta'zīr* punishment which is supposed to serve its aims by making the offender fear the punishment with which he is threatened. It may be carried out by threatening the offender with punishment if he repeated what he had done, or by pronouncing a sentence against him and delaying its execution till the offender committed another offence (within a short period). Besides the normal condition of the suitability of the *ta'zīr* punishment, the threat must be sincere.³

4. Boycott (*al-Hajr*)

Boycott as a *ta'zīr* punishment is recommended

1. 'Uda, *al-Tashrī' al-Jinā'i*, Vol. I, Cairo 1959, p. 702.

2. *Mishkāt al-Maṣābiḥ*, Vol. II, p. 586.

3. 'Uda, *al-Tashrī' al-Jinā'i*, Vol. I, Cairo 1959, p. 703.

by the Holy Qur'ān as under :

وَاهْجُرُوهُمْ فِي الْمَضَاجِعِ

“Refuse to share their beds.” (4 : 34)

It was practised by the Holy Prophet (peace and blessings of Allāh be upon him) in the case of those men who did not attend the army in the battle of Tabūk.¹ It was also inflicted by the second Caliph Ḥaḍrat ‘Umar (Allāh be pleased with him).²

5. Public Disclosure (*al-Tashhīr*)

Al-Tashhīr (stigmatising) has been known as a punishment since the early days of Islam. By means of *tashhīr* the Holy Prophet (peace and blessings of Allāh be upon him) punished a man who, after collecting the *Zakāt*, divided it into two portions of which he took one for himself ; claiming that it had been given to him as a present.³

According to Shurayḥ, a well-known Qāḍī who served during the reigns of Ḥaḍrat ‘Umar and of Ḥaḍrat ‘Alī (Allāh be pleased with them), the false witness must be publicly identified so as to warn public not to trust him.⁴ On this point all the jurists are agreed.⁵ The means of *tashhīr* were usually the taking of the offender, by some of the judges' representatives to every part of the city and telling

1. Ibn Taimiyya, *al-Siyāsa al-Shari'ah*, Cairo, 1951, p. 120, 121.

2. Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, p. 202.

3. *Mishkāt al-Maṣābiḥ*, Vol. I, p. 560.

4. Sarakhsi, *Mabsūṭ*, Vol. 16, p. 145.

5. *Ibid.*, Ibn Farḥūn, *Tabṣira*, p. 214.

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2. Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, p. 202.

3. *Mishkāt al-Maṣābiḥ*, Vol. I, p. 560.

4. Sarakhsi, *Mabṣūṭ*, Vol. 16, p. 145.

5. *Ibid.*, Ibn Farḥūn, *Tabṣira*, p. 214.

the people that he had committed an offence for which he had received a *ta'zir* punishment. The purpose of this punishment is to call the attention of the public to the fact that the offender is not to be trusted.

6. Fines and Seizure of Property

(*al-Gharāmah wal Muṣādarah*)

Fines were imposed as punishment in cases of *ta'zir* during the period of the Holy Prophet (peace and blessings of Allāh be upon him). The jurists are however, divided into three groups as to its legality. According to some it is illegal to punish by fine or by seizure of property. Others regard it as legal, while a third group regards it as legal only if the offender does not repent.

The first view is held by the Ḥanafī School and some of the Shāfi'īs.¹ According to the Imām Mālik, the Imām Aḥmad b. Ḥanbal, the Imām Abū Yūsuf (the famous Ḥanafī jurist), and some of the Shāfi'īs, financial punishments are allowed as *ta'zir*.² The Ḥanafī jurists explained that the view of the Imām Abū Yūsuf means that the Qādī, or the Ruler, should keep the offender's money away from him until he has repented. They support this view by saying that nobody is allowed to take another's property otherwise than for a legal reason (*bi-sabab Shar'i*). If it seems afterwards, that the offender

1. Ibn al-Humām, *Fatḥ al-Qdīr*, Cairo (n.d.) Vol. IV, p. 212.

2. Ibn Farḥūn, p. 203; Ibn al-Qayyim, *al-Turuq al-Hukmiyya*, Cairo, 1961, p. 286-290.

will not repent then the Ruler may order the money to be spent on public requirements. The reason they give for this explanation is that to allow the Qādī or the Ruler to take the offender's money for the *Bait al-Māl* (Public Treasury) straight away, would be open to abuse by unjust Qādīs or Rulers.

On the other hand the jurists who deny financial punishment as a legal *ta'zīr* punishment claim that it was legalized in the beginning of Islam but abrogated afterwards. Ṭahāwī was the first jurist who expressed this view in his famous book "*Sharh Ma'ānī al-Āthār*." This abrogation claim of al-Ṭahāwī was strongly rejected by the Imām Ibn Taimiyya and his successor Ibn al-Qayyim on evidence taken mainly from the Prophet's practices and from some of his Companion's decisions.¹ Ibn al-Qayyim added :

"These are well-known cases which have been truly related. Those who claim that financial punishment was abrogated are wrong. Their view may be refuted by the cases ascribed to great Companions of the Holy Prophet (peace and blessings of Allāh be upon him). Neither the Holy *Qur'ān* nor the *Sunnah* can help them in supporting their claim, nor is there any consensus about it. Even if there was a consensus, it would have no power to abrogate the *Sunnah*. The best they may say is : in our School's view it is not allowed ; that means they take their

1. Ibn Taimiyya, *al-Hisba*, Cairo (n.d.), p. 43 ; Ibn al-Qayyim, *al-Ṭuruq*, pp. 286-290.

own view as a standard of what is accepted and what is not."¹

Similarly other Hanbalī, Hanafī and Mālikī Commentators hold this view and defend it mainly in Ibn al-Qayyim's words. In the light of Ibn al-Qayyim's views, both kinds of the financial punishment (*i.e.*, fine and seizure of property) are allowed in the Islamic Penal Law. In some of the cases amount of fine was determined by the Holy Prophet (peace and blessings of Allāh be upon him) *e.g.*, in the case of theft where a stolen property does not reach the minimum *Niṣāb* required for imposing the *ḥadd* punishment ; failure in paying *zakāt* etc. In other cases it is left to the discretion of Qāḍī to decide how much the offender should be fined. Hence it is incorrect to say that there are no financial punishments prescribed under the Islamic Penal Law and that the Islamic Penal System does not recognize it.

7. Imprisonment (*al-Ḥabs*)

There are two types of imprisonment in Islamic Law : imprisonment for a definite term and imprisonment for an indefinite term. Imprisonment for a definite term may be inflicted for minor offences, as the jurists prefer flogging as the punishment for major *ta'zīr* offences. The minimum period for imprisonment is one day,² and as to the maximum

1. Ibn al-Qayyim, *al-Turuq*, p. 287, 288.

2. Ibn Qudāmah, *Mughni*, Vol. X, Cairo, pp. 347, 348.

period, there is a difference of opinion among the jurists. The Mālikī, Hanafī and Hanbalī Schools do not fix a maximum period for the *ta'zir* imprisonment as it varies for each offence and from one individual to another.¹ According to the Shāfi'ī School, the maximum period of imprisonment is one month for investigation and six months as punishment and in any case it must not exceed one year. This view is based on an analogy or *qiyās* to the punishment for adultery committed by an unmarried person. Banishment for adultery (a *ḥadd* in Shāfi'ī's view) is for one year. Therefore, *ta'zir*, if it is to be by imprisonment, must not exceed that which is a *ḥadd*. However among the Shāfi'ī jurists there is another view which is similar to that of the other three Schools. The majority view, therefore, is that the Qāḍī is free to determine the maximum period of a definite term of imprisonment. It is allowed, according to all the Schools of Islamic Jurisprudence, to inflict imprisonment as an additional punishment if the circumstances so require.²

As for imprisonment for an unlimited term, it is imposed on habitual criminals who, in the view of the Qāḍī, cannot be reformed by ordinary kinds of punishment. This punishment may last either till the criminal's repentance or his death, in the case of a dangerous criminal.³ This kind of imprison-

1. Abū Ya'lā, *al-Aḥkam al-Sultāniya*, Cairo, 1938, p. 263.

2. Ibn al-Humām, *Fatḥ al-Qḍir*, Vol. IV, p. 216.

3. Ibn Farḥūn, *Tabṣirat al-Hukkām*, p. 227.

ment is similar to that of the *ḥadd* punishment for armed robbery (*hirābah*) where one of the punishments prescribed is banishment (interpreted as imprisonment), to be inflicted till the criminal's repentance or until his death. *Ta'zīr* imprisonment for indefinite period can only be ordered so long as reform of the offender by another punishment is impossible. It is only on this occasion that unlimited imprisonment is justifiable.

8. Flogging (*al-Jald*)

Flogging is a common punishment in Penal Law of Islam. It is prescribed as a *ḥadd* punishment for the crime of *qadhf* (eighty lashes), and for adultery committed by an unmarried person (hundred lashes). It is also prescribed for many *ta'zīr* offences. The point at issue here is the maximum number of lashes allowed as *ta'zīr*. The problem, for Muslim jurists, is whether *ta'zīr* punishment may exceed the *ḥadd* punishment.

The most liberal view in this regard is that of Mālikī. According to the Imām Mālik, *ta'zīr* punishment may exceed the *ḥadd* punishment as long as the Qādī or the Ruler thinks that there exist such circumstances which require it. The opposite view is held by the Zāhiri and Zaydi Schools, and part of the Hanbali School, who believe that flogging as a *ta'zīr* punishment cannot exceed ten lashes.¹ Compromising views are held by the Hanafi and

1. *Muḥalla*, Vol. XI, p. 404; *Al-Rawḍ al-Nadīr*, Vol. IV, Damascus, 1968, p. 178.

Shāfi'i Schools and some Hanbalī Scholars. There is no unanimity about the maximum number of lashes to be inflicted.

This controversy is based on two *Aḥādīth*. In the first, the Holy Prophet (peace and blessings of Allāh be upon him) forbade more than ten lashes to be inflicted except in cases of *ḥadd* punishment. This is related by the Imām Muslim and the Imām al-Bukhārī. The second which is related by al-Baihaqī is to the effect that the Holy Prophet (peace and blessings of Allāh be upon him) labelled those who exceed the limits of the *ḥadd* punishment, in a "non-*ḥadd*" offence, as transgressors "*mu'tadūn*."¹

The dominant view about the first tradition is that it was abrogated; this is deduced from the fact that the Companions of the Holy Prophet (peace and blessings of Allāh be upon him) did not act in accordance with it. It is related that Ḥaḍrat 'Umar and Ḥaḍrat 'Ali (Allāh be pleased with them) inflicted more than ten lashes in cases of *ta'zīr* with no objections from the other Companions, so the tradition, according to the majority view, must have been abrogated.²

Another interpretation of this *Ḥadīth* was given by Ibn Taimiyya and Ibn al-Qayyim. They hold this tradition as relevant to the relations between father and son, master and servant and the like, i.e.,

1. Al-Baihaqī, *al-Sunan al-Kubrā*, Vol. VIII, p. 327.

2. Ibn Farḥūn, Vol. II, p. 204.

relationships in which one may need to use some means of punishment for disciplinary reasons. In such cases if the proper means is flogging, it must not exceed 10 lashes. But this tradition has nothing to do with the relationship between the individual and the state, and the number of lashes allowed as *ta'zīr* punishment is left to the discretion of the authority concerned. According to this view there is no need for the abrogation claim as the tradition is not relevant to the case in question.

The second *Ḥadīth* although incompletely transmitted (*mursal*), was accepted by all the Sunni Schools except the Māliki. Those who accepted this tradition interpreted it in different ways, and so their views vary about the maximum *ta'zīr* punishment. The first interpretation is that this tradition forbade *ta'zīr* punishment to exceed the minimum limit of the *ḥadd* punishment. The second interpretation is that the tradition forbade *ta'zīr* to equal the *ḥadd* punishment in cases of incomplete crimes for which, if they were completed, a *ḥadd* punishment would be prescribed. That is to say a crime of theft, for which the *ḥadd* punishment cannot be inflicted, may result in *ta'zīr* of one hundred lashes. A sexual relationship (which has not involved sexual intercourse), should not reach 100 lashes if the offender is unmarried because his original *ḥadd* punishment is 100 lashes.¹

The minimum number of lashes allowed as *ta'zīr*

1. 'Uda, *al-Tashrī' al-Jinā'ī* Vol. I, Cairo 1959, p. 692.

was also discussed ; some jurists fixed it at 3, but the majority does not agree with this view as it contradicts the main feature of *ta'zīr*, i.e., its variation from one crime to another according to the offender's conduct and other circumstances.

However, the view expressed by Ibn Taimiyya and his companions is the most relevant view both practically and logically. In practice, they allow any suitable punishment and avoid the strict limitation imposed on the Ruler's power to inflict *ta'zīr* punishment. From the logical point of view they limit the tradition about the number of lashes allowed for "non-hadd" punishment, to a particular area and are, therefore, not forced to use the abrogation claim as other Scholars do. This is also in harmony with a principle of Islamic Law, recommending the application of every legal verdict rather than its neglect.¹

9. The Death Penalty (*Al-Ta'zīr bil-Qatl*)

Ta'zīr is a part of Islamic Penal Law which deals with the less serious offences. The death penalty is usually imposed for the most heinous crimes. According to Islamic Penal Law it is the punishment of two *hadd* offences and, as a retaliation, for homicide. The jurists, accordingly, are normally against its infliction as a *ta'zīr* punishment,² but exceptional cases in which *ta'zīr* by the

1. Ibn Nujaym, *al-Ashbāh wal Naẓā'ir*, Vol. I, Cairo, 1290 A.H., p. 168.

2. Ibn Farḥūn, Vol. II, p. 205.

death penalty is allowed are mentioned in the texts of almost every School. According to Ḥanafī texts the offences in which death penalty is imposed are adultery, dacoity, the murder wherein *qisās* cannot be imposed and those offenders whose harmful conduct may not be stopped by other punishments.¹ For the Mālikī School, the principle that the *ta'zīr* punishment should fit the crime, the criminal, and the victim is of absolute application. Thus the death penalty is permissible in certain cases, where either the offence itself is of a very heinous nature, such as spying for the enemy or propagating heretical doctrines or practices which split the community, or where the criminal is a habitual offender and there is no other effective method to stop his wickedness.² The Shāfi'īs and Ḥanbalīs hold a similar view.

However, it must be noticed that there are some traditions which allow the death penalty as a *ta'zīr* punishment. The different views must be measured by these traditions. However, capital punishment should always be regarded as an extraordinary *ta'zīr* punishment. Thus, it could only be imposed in cases of absolute necessity.

Some Ta'zīr Offences

Ta'zīr offences may be either of the same essential nature as the *hadd* offences or of a less serious

1. Ibn 'Abdīn, *Hāshiya*, Vol. IV, pp. 27, 62-64.

2. Ibn Farḥūn, Vol. II, p. 200 and C.F.N. Coulson, *The State and the Individual in Islamic Law*, p. 54.

degree or may qualify simply as "transgression." In both cases determination of the punishment is at the discretion of the Qāḍī. But in the case of a "transgression" it is usually said that the Ruler or the Qāḍī has to determine the offence as well. This view is absolutely wrong. To see how accurate this view is one must refer to the definition of *ta'zir* as a punishment to be delivered, for which there is neither *hadd* punishment nor *kaffārah*. The right to determine what is a transgression and what is not is reserved in Islamic Law for Almighty Allāh only, as the Muslims believe that Islamic Law is the final Will of Allāh.¹ Allāh's Will is expressed in the Holy *Qur'ān* and in the *Sunnah*. The Holy *Qur'ān* and the *Sunnah* contain many statements which forbid some types of human activity and classify them as sins (*ma'āṣi*). For these forbidden activities the Ruler's or Qāḍī's task will be merely to choose punishment applicable in each case, but he has nothing to do with the determination of the offence as it has already been determined by the Holy *Qur'ān* or the *Sunnah*. Examples of such cases are innumerable. Following are some of the most important ones :

1. Usury (*al-Ribā*)

The Holy *Qur'ān* forbade usuary in various verses in *Sūrah al-Baqara*, and *Āl-i-'Imrān*. One of

1. Shalbi, *Al-Fiqh al-Isāmī bayn al-Mithāliya wal-waqi'ya*, p. 42.

the verses runs :

وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا ط

“But Allāh hath permitted trade and forbidden usury.” (2 : 275)

Another verse says :

يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنتُمْ

مُؤْمِنِينَ ۝ فَإِنْ لَّمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِّنَ اللَّهِ وَرَسُولِهِ ؕ

“O ye who believe ! fear Allāh, and give up what remains of your demand for usury, if ye are indeed believers. If ye do it not, take notice of war from Allāh and His Apostle. (2 : 278, 279)

Again the Holy *Qur'ān* says :

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا الرِّبَا أَضْعَافًا مُّضَاعَفَةً وَاتَّقُوا اللَّهَ

لَعَلَّكُمْ تَفْلِحُونَ ۝

“O ye who believe ! Devour not Usury, doubled and multiplied ; but fear Allāh ; that ye may (really) prosper. (3 : 130)

Usury therefore is a prohibited activity ; its doer deserves punishment which has not been fixed in the Holy *Qur'ān* or the *Sunnah*. Duty of the Qādī is to choose the proper punishment for it, but he does not determine the offence. Jurists are not unanimous about what may be considered usury and what may not. In this respect the Qādī may simply

determine whether the offender's act constitutes prohibited conduct or not. Such is the role of any court in relation to any crime : to establish, in light of the evidence provided, the offender's guilt, after which the penalty can be pronounced.

A person who accepts Ribā (usury) ceases to be an 'adl and loses his competency for evidence.

2. False Testimony (*Shahādat al-Zūr*)

False testimony has been condemned in the Holy *Qur'an* and believers are directed to state the truth when testifying. One verse says :

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَىٰ

أَنفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ

“O ye who believe ! stand out firmly for justice, as witnesses to Allāh, even though it be against yourselves, or your parents or your kinsmen.”

(4 : 135)

Another verse describes believers as :

وَالَّذِينَ لَا يَشْهَدُونَ الزُّورَ

“Those who witness no falsehood.” (25 : 72)

Another verse orders the believers :

وَاجْتَنِبُوا قَوْلَ الزُّورِ

“And shun the word that is false.” (22 : 30)

The jurists have said quite a lot about the punishment of a false witness, but the offence has been defined in the Holy *Qur'ān* and what the jurists said applies to the stage of choosing the punishment for the offence rather than its determination. For Libel and slander (or vituperative remarks) against a person, the case should be referred to the Qāḍī under *تول الزور* and the Qāḍī can both inflict punishment (*ta'zīr*) and pass decree of redress.

3. Breach of Trusts (*Khiyanat al-Amānah*)

The Holy *Qur'ān* says :

إِنَّ اللَّهَ بِأَمْرِكُمْ أَنْ تُوَدُّوا إِلَى أَهْلِهَا ۖ

“Allāh doth command you to render back your Trusts to those to whom they are due.” (4 : 58)

Another verse runs :

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَخُونُوا اللَّهَ وَالرَّسُولَ وَتَخُونُوا أَمْنَكُمْ
وَأَنْتُمْ تَعْلَمُونَ ۝

“O ye that believe ! betray not the trust of Allāh and the Apostle, nor misappropriate knowingly things entrusted to you.” (8 : 27)

It was on these verses, and many others, that the Muslim jurists based their treatment of this offence. Noteworthy is the fact that the Holy Prophet (peace and blessings of Allāh be upon him) equalized *khiyānat al-Amānah* with theft.¹

1. Muslim, *Ṣaḥīḥ*, Vol. V, p. 115.

4. Insults (*al-Sabb*)

To insult a human being, according to the Holy *Qur'ān*, is forbidden even if the insulted person is an infidel, or as the Holy *Qur'ān* says :

وَلَا تَسُبُّوا الَّذِينَ يَدْعُونَ مِنْ دُونِ اللَّهِ

“Abuse not those who pray apart from Allāh.”

(6 : 109)

As for the Muslims among themselves the *Qur'ānic* Command is :

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَسْخَرُ قَوْمٌ مِنْ قَوْمٍ عَسَىٰ أَنْ يَكُونُوا

خَيْرًا مِنْهُمْ وَلَا نِسَاءٌ مِنْ نِسَاءٍ عَسَىٰ أَنْ يَكُنَّ خَيْرًا مِنْهُنَّ وَلَا

تَسْلِيْزُوا أَلْفُسَكُمْ وَلَا تَنَابَزُوا بِالْأَلْقَابِ ط بِئْسَ الْإِسْمُ الْفُسُوقُ

بَعْدَ الْإِيمَانِ ؕ

“O’ believers, let not any people scoff at another people who may be better than they ; neither let women scoff at women who may be better than themselves. And find not fault with one another, neither revile one another by nick-names. An evil name is ungodliness after belief.” (49 : 11)

Accordingly insult is classified as a ta‘zir offence.

5. Bribery (*al-Rishwa*)

As the Holy *Qur'ān* forbade usury and considered it an unlawful way of making money, all

means of making money by dishonesty are therefore, forbidden. About bribery the Holy *Qur'ān* says :

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتَذُلُّوا بِهَا إِلَى الْحُكَمِ
لِتَأْكُلُوا فَرِيقًا مِنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ ۝

“Consume not your property between you in vanity, neither proffer it to the judge, that you may sinfully consume a portion of other man's property intentionally.” (2 : 188)

No punishment has been fixed for bribery, thus it is classified as a *ta'zīr* offence, for which the authority may impose a punishment.

6. No Appeal against the Sentence pronounced by a Qāḍī

In Islamic Law there is no *مراجعة* (*murāfa'a* : appeal) against the sentence of a Qāḍī. The punishment is executed without delay and without any resistance. The Qāḍī enjoys the sanction of the *Qur'ān*, for he has been accepted as the *حَكَم* (*Hakam* : arbitrator) by virtue of professing Islam, and the Qāḍī decides the case strictly in accordance with the Laws of the *Qur'ān* and the *Sunnah*. Hence the convict cannot prefer an appeal to the Ruler. After that the punishment has been inflicted, the convict may complain against the Qāḍī, in which case the Ruler may investigate into the facts. If the Ruler finds that the Qāḍī has wrongfully punished the appellant, the punishment will revert to the Qāḍī

(e.g., if the appellant had been flogged 80 stripes, the Qāḍī will receive the same number of stripes) and *ipso facto* will be deposed.

If the appellant is found a liar, he will undergo a further sentence of a *ta'zir* for lying.

7. Contempt of Court

Since the Qāḍī is an 'adl (عَدْل) and of reputed integrity, any statement or remark against his judicial actions is a cognizable offence. The offender shall have to produce evidence and prove his assertion, or else shall be convicted and punished for lying and defaming the 'adl.

8. Introduction of Innovations in the Laws of Islam

Should ever a person try to introduce innovations in the laws and dogmas of Islam, he will be held accountable before the Qāḍī or the Ruler. Theologians and other Scholars will be invited to debate with the innovator, and satisfy the Qāḍī.

A sorcerer (magician) belongs to the same category, as he is likely to mislead the public and to play with the convictions of the Muslims in general. A person claiming دَعْوَة (Da'wa) i.e., the power of inviting the spirits, or كَيْهَانَة (i.e., divination) or fortune, telling by palmistry and astrology is to be punished severely.¹

1. *Al-Qur'ān*, 2 : 96 ; *Miskāt al-Masābih*, Vol. 21, Chapter 3, Part I.

The only admissible form of such incantation is *la'z'ir*, a formula pronounced repeatedly to counteract the ill effects of an evil eye and seeking assistance of Allāh alone.

These examples are enough to show that *la'z'ir* offences are mainly determined in the Holy *Qur'ān* and the *Sunnah*. It is by no means claimed that the Ruler has no right, outside the province of the Holy *Qur'ān* or the *Sunnah*, to establish offences and their punishments; but this right is limited to what is necessary for the achievement of the aims and ends approved by the Islamic Law. Nevertheless it is quite unjustifiable when it is contrary to the Holy *Qur'ān* and the *Sunnah*.

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